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Cited in the following series:
U. S. Supreme Court (US; LEd, Lawyers' Edition); Federal Reports (Fed); Massachusetts (Mas); Connecticut (Con); New Jersey Law (NJL); New Jersey Equity (NJE) and the Lawyers' Reports, Annotated (LRA) and its Annotation (n).

Shows where the decisions in this volume have been cited—where to find precedents on their subjects from the courts carrying most weight in this state. The ANNOTATIONS referred to (marked n) give a complete presentation of authorities on the point in question—all the law.

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REPORTS OF CASES

DECIDED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

FROM AND INCLUDING SEPTEMBER 5, 1871, DOWN TO AND INCLUDING A PORTION OF THE DECISIONS HANDED DOWN DECEMBER 12, 1871,

WITH

NOTES, REFERENCES AND INDEX.

BY H. E. SICKELS,
COUNSELOR-AT-LAW.

VOL. I.

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Rec. Aug. 28, 1872

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PREFACE.

Prompted by a desire to place before the profession, at the earliest practicable moment, the accumulated decisions handed over to me by my predecessor, I have prepared this volume somewhat hastily; too much so perhaps, for careful analyses and accurate statements of facts, at least by one inexperienced in the task.

I trust the motive will serve as a partial apology for the blunders that may be discovered herein, and will induce a lenient criticism.

I propose but few changes in the plan adopted by the late reporter. The "table of cases cited," only contains those cited in the opinions. The object in view in publishing such a table, of tracing "leading" or "frontier" and important cases, it seems to me can be thus accomplished, without cumbering the reports with the numerous authorities cited in counsel's points. Many members of the bar have expressed a wish to have a reference, in some shape, to the cases marked "not to be reported," at least those in which any general principles are discussed and passed upon. To meet this wish, and with the approval of the court, I have added a list of the cases decided during the period embraced in the volume, which are not reported in full, with brief reports or memoranda of such as present any question not limited by the case itself. These are regularly indexed with the full reports.

The volume closes with the proceedings in the Court of Appeals upon the announcement of the death of the Hon. HIRAM DENIO. Aside from the labors of this distinguished jurist, at the bar and upon the bench, his reports, so clear, concise and comprehensive, have been, and will ever remain, models to all who succeed him; and in no more fitting place can his memory be embalmed.

H. E. SICKELS.

ALBANY, *May* 20, 1872.

JUDGES OF THE COURT OF APPEALS.

SANFORD E. CHURCH, CHIEF JUDGE.
WILLIAM F. ALLEN,
RUFUS W. PECKHAM,
MARTIN GROVER,
CHARLES J. FOLGER,
CHARLES A. RAPALLO,
CHARLES ANDREWS.

Associate Judges.

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ERRATA.

In the syllabus to *White* v. *Howard*, page 144, an important paragraph as to power of foreign corporations to take by devise was omitted. It appears in the index.

In the syllabus to *Hart* v. *Messenger*, page 253, the word "offered," in fifth line from bottom of page, should be "given."

In the syllabus to *Davis* v. *Lottich*, page 398, the word "his," in the eleventh line from the bottom of page, should be "no."

CASES

DETERMINED IN THE

COURT OF APPEALS

OF THE

STATE OF NEW YORK,

AT THE SEPTEMBER TERM, A. D. 1871.

DELOS L. HOLDEN, Respondent, *v.* THE PUTNAM FIRE INSURANCE COMPANY, Appellant.

The mandate of the act of congress of 1789, that where the proper steps are taken, which entitles defendant to the removal of a cause to the Circuit Court of the United States, the State court shall "proceed no farther in the cause," is obligatory as well upon a court of appellate as of original jurisdiction.

Upon an application to remove, it is necessary for defendant to show as well that the suit was commenced "by a citizen of the State in which the suit is brought," as that it was commenced "against a citizen of another State." A petition, therefore, stating that plaintiff "*is* a citizen" is insufficient. No legal presumption arises from it that he was a citizen at the time of the commencement of the action.

One party to a contract is not estopped from enforcing it, by the execution of an instrument purporting to cancel the contract for a consideration, where none in fact is received by him, and the act is induced by the false representations of the agent of the other party, although the latter has acted upon the faith of the declarations contained in said instrument, in settling the accounts of the agent.

(Argued June 14th, 1871; decided September 2d, 1871.)

APPEAL from an order of the late General Term of the sixth judicial district, affirming an order of Special Term, denying a motion to remove action to the Circuit Court of the United States for the northern district of New York.

Also, appeal from judgment entered on decision of said General Term, denying motion for new trial and directing judgment on verdict. Cause tried at Chemung circuit.

Statement of case.

The facts appearing upon the motion are sufficiently set forth in the opinion.

The defendant is a fire insurance company created by the laws of the State of Connecticut, with its principal place of business at Hartford, in said State, and doing business in the State of New York, by agents appointed for that purpose. On the 18th of May, 1866, it issued a policy of insurance to the plaintiff upon a stock of groceries, etc., at Elmira, running for one year. On the 23d of December, 1866, the stock was destroyed by fire. On the 25th of March, 1867, the plaintiff, who is a citizen of the State of New York, brought his action in the Supreme Court of the State of New York, to recover upon such policy of insurance.

The defendant read in evidence a receipt executed by the plaintiff, as follows:

"ELMIRA, N. Y., *Dec.*, 18, 1866.

Received of the Putnam Fire Insurance Company, by the hands of McKinney & Brown, agents, thirty dollars, being return premium for policy 143, which is hereby canceled and surrendered, the policy being mislaid or lost.

{U. S. Int. Rev. 2 cent Stamp, Canceled.} D. L. HOLDEN."

In fact the premium never was returned to plaintiff. The receipt was executed under a mutual mistake of plaintiff and Brown, the agent of defendants in the transaction, plaintiff relying upon the representation of Brown, defendant's agent, that the policy had been canceled and a new policy substituted in place of the one in question. Before the fire the defendant, relying upon the receipt as a voucher, settled with the agents McKinney & Brown allowing them the amount stated in receipt. The counsel for the defend ant asked the court to instruct the jury, "that if the plaintiff signed this receipt of December 18, at the request of McKinney & Brown, or either of them, for the purpose of enabling them to adjust their accounts with the company, and the company subsequently adjusted their accounts with McKinney & Brown, before being notified that this policy was out-

standing and before the fire, upon the basis that this policy had been surrendered, then the plaintiff cannot recover."

The court declined so to charge the jury, upon the ground that the proposition ignores the question of the mutual mistake of fact, and the defendant's counsel duly excepted. The defendant's counsel then requested the court to charge the jury, "that if they should find that the plaintiff signed the receipt as stated in his last preceding request, then the plaintiff is estopped from bringing this action." The court declined so to charge, and the defendant's counsel duly excepted.

The jury rendered a verdict for the plaintiff for $2,131.29. The court directed the exceptions to be heard in the first instance at the General Term. The General Term overruled the defendant's motion for a new trial, and directed judgment for plaintiff which was accordingly entered.

W. F. Cogswell, for appellant, that Supreme Court was ousted of jurisdiction and all further proceedings were void, *Stevens* v. *Phœnix Insurance Company* (41 N. Y., 149). That the facts stated in request to charge, present every element of estoppel *in pais*. (*Dezell* v. *Odell*, 3 Hill, 215; Abbott's Digest, vol. 2, p. 587, title estoppel, §§ 100 and 101.) That the mistake of plaintiff did not affect the question of estoppel. (*The Manufacturers' and Traders' Bank* v. *Hazard*, 30 N. Y., 226.)

H. B. Smith, for respondent; that petition to remove cause should show plaintiff was a citizen of this State "at time of *commencement of action*." (*People* v. *Chicago*, 34 Ill., 356; *Savings Bank* v. *Benton*, 2 Metc., Ky., 242.) That doctrine of estoppel did not apply. (*East India Co.* v. *Vincent*, 2 Atkins, 83; *Clayburgh* v. *Byerly*, 7 Gill, 584; *Alexander* v. *Kerr*, 2 Rawle, 83; *Hepburn* v. *McDowell*, 2 Penn., 23; 17 S. & R., 383; *Cust* v. *Jack*, 3 Watts, 328; *Menges* v. *Oyster*, 4 W. & S., 20; *Casey* v. *Inloes*, 1 Gill, 430; *Monroe* v. *Hanson*, 3 Harris, 383; *Knouff* v. *Thompson*, 4 id., 502; *Gray* v. *Bartlett*, 20 Pick., 186; *Morris* v.

Moore, 11 Humph., 433.) That plaintiff's mistake in signing this receipt is a sufficient answer to the estoppel asserted. (*McKay* v. *Holland*, 4 Metc., 59; *Whittaker* v. *Williams*, 20 Conn., 98; *Dyer* v. *Coy*, 20 id., 568; *Stelle* v. *Putney*, 3 Shepley, 337; 8 Iredell, 83; *Carpenter* v. *Stilwell*, 1 K., 61; See opinion of JOHNSON, J., at pp. 73, 79; *Storrs* v. *Baker*, 6 J. Ch., 166; 8 Bosw., 1, 15, 16.)

ANDREWS, J. The defendant is a corporation created by the law of Connecticut, and is a citizen of that State within the federal judiciary act of 1789. Its citizenship was not changed, nor was its right to apply for a removal of the action from the State to the federal court affected by the fact, that it made contracts of insurance in this State, and had complied with the provisions of our statute respecting foreign insurance companies, and subjected itself to the visitatorial power of the State. (*Stevens et al* v. *Phœnix Insurance Company*, 41 N. Y., 149.)

If the proceedings on the part of the defendant, to remove the case to the Circuit Court of the United States, were in accordance with the twelfth section of the act of congress referred to, and if the facts presented to the court upon that application, established a case within the act, then the State court *eo instanti*, lost jurisdiction of the case, and it was by operation of law vested in the federal court, and all subsequent proceedings in the action in the State court were void. (*Gordon* v. *Longest*, 16 Peter's 97; *Kanouse* v. *Martin*, 15 How., U. S., 198.)

As we have reached a conclusion adverse to the defendant, upon the merits of the application for the removal of the cause, it is unnecessary to decide the point made by the respondent, that this court cannot review the order denying the application for the removal. (*Illius* v. *The New York and N. H. R. R. Co.*, 3 Kern., 597.)

The petition and papers used upon the application to remove the cause, are attached to and made a part of the record, and if upon them a case was made, which entitled the defendant

to have the cause removed, this court could not disregard the error of the court below and affirm the judgment, although the order made upon the application was not appealable within section 11 of the Code. The mandate of the statute of 1789, that in such a case the State court "should proceed no further in the cause," is obligatory as well upon a court of appellate as of original jurisdiction. This court could not give judgment of affirmance without disregarding the statute, but it could suspend or dismiss the appeal, leaving the defendant to pursue his remedy in the federal court, to correct the error of the State court in denying the application. The fact that the defendant was a citizen of Connecticut was not alone sufficient, to authorize the removal of the cause to the federal court under the twelfth section of the act. It was also necessary, that the suit should have been brought by a plaintiff, who at the time of the commencement of the action, was a citizen of the State in which the action was brought. The language of the statute does not admit of any other construction. The right of removal is confined to suits against aliens, and to suits commenced, "by a citizen of the State in which the suit is brought, against a citizen of another State." It was as essential for the defendant to show, upon the application to remove the cause, that it was brought by a citizen of this State as that it was brought against the citizen of another State. The State court had jurisdiction of the action, and it could only be deprived of its jurisdiction, by proceedings in conformity with the act of congress, and upon proof presented to the court of the facts, which under the act determined its jurisdiction, and entitled the defendant to have the cause transferred to the Circuit Court of the United States. The only proof of the citizenship of the plaintiff, made upon the application, is found in the petition of the defendant made and verified April 5, 1867, which recites, that the action was commenced March 25, 1867, and after stating the nature of the action, and that the defendant is a citizen of Connecticut, proceeds as follows: "That Delos L. Holden, the plaintiff in said action, is a citizen of the State of New York." This is

simply an averment, that when the petition was drawn the plaintiff was a citizen of this State, but no legal presumption arises from this fact, that he was a citizen at the time of the commencement of the action.

The rights of the parties under this statute, are governed by the facts existing at the commencement of the suit, and a subsequent change of residence or citizenship does not confer or defeat a right to proceed under it. (*Clark* v. *Mathewson, et al.*, 12 Pet., 164; *Morgan* v. *Morgan*, 2 Wheat., 290.) The case of *Mollan* v. *Torrance* (9 Wheat., 537), is an authority very much in point upon this question in the case.

The statute of 1789 gives jurisdiction to the Circuit and District Courts of the United States, in civil actions between citizens of different States, when the amount in controversy exceeds five hundred dollars. In the case cited the action was brought in the District Court of Mississippi, by the plaintiff claiming title by assignment, to the claim upon which the action was founded. The defendant pleaded to the jurisdiction of the District Court, that the person under whom the plaintiff claimed, was a citizen of Mississippi, of which State the defendant was also a citizen. The court sustained the demurrer to the plea and MARSHALL, Ch. J., said: "A plea to the jurisdiction of the court must show, that the parties were citizens of the same State, at the time the action was brought and not merely at the time of the plea, pleaded. The jurisdiction depends on the state of things at the time of the action brought."

It did not appear upon the application made in this case, that the plaintiff was at the time of the commencement of the action a citizen of New York, and the court properly denied the application and retained jurisdiction of the action. (*People* v. *Chicago*, 34 Ill., 356; *Savings Bank* v. *Benton*, 2 Metc., Ky., 242.)

The remaining question in the case, relates to the effect of the receipt of December 18, 1866, given by the plaintiff. The counsel for the defendant requested the court to instruct the jury, that if this receipt was signed by the plain-

tiff, at the request of McKinney & Brown or either of them, to enable them, to adjust their account with the defendant, and that subsequently and before the fire, such adjustment was made upon the basis, that the policy to the plaintiff had been surrendered, the plaintiff was estopped and could not recover. This instruction was refused and the defendant excepted. It is not controverted, that up to the time the receipt was given, the contract of insurance between the parties was in full force, notwithstanding the instructions which had been given by the defendant to its agent McKinney & Brown to cancel it, and their representation to the company that such cancellation had been made. The right reserved to the defendant, to cancel the policy on returning the unearned portion of the premium, had not been exercised. The plaintiff had assented to the proposal of McKinney made in September, to surrender the policy upon being furnished with one of like amount in another company, but the arrangement was not consummated; no policy was furnished and the unearned premium was not paid or tendered. The receipt acknowledged the payment and declared, that the policy was surrendered and canceled, but no money was in fact paid, nor was any consideration received by the plaintiff for a surrender or cancellation of the instrument. The receipt was procured by Brown, acting in that business at the instance and at the request of the defendant, and upon his representation and assurance to the plaintiff, that the arrangement proposed by McKinney had been consummated, and that a policy in another company, had been issued to the plaintiff in place of the policy of the defendant.

There is no contradiction on any material point of the statement made by the plaintiff, of the circumstances under which the receipt was given. The plaintiff signed the receipt under a misapprehension of and in ignorance of material facts, and relying upon the statements of Brown, which though made in good faith were false in fact. It is the constant practice of courts of equity, to relieve parties from contracts grounded in material error and mistake of fact, although

both parties were innocent and free from fraud; and the act of the plaintiff, in executing an instrument purporting to cancel the contract of insurance, induced, in part at least, by false information, communicated by the agent of the other party to the contract, should not conclude him, and the case is within the remedial jurisdiction of the court. (Story's Eq. Jur., §§ 142, 167; *Hore* v. *Becher*, 12 Sim., 465; *East India Co.* v. *Donald*, 9 Ves., Jr., 275.)

Nor is there any ground for the application of the doctrine of equitable estoppel. The defendant claims to have been discharged from the contract, without performance, because the company acted upon the faith of the declaration contained in the receipt to its prejudice. But this declaration was induced by the conduct of its agent. It cannot claim the benefit of the receipt and repudiate the representations upon which it was given. It is not claimed, that there was any collusion between the plaintiff and Brown, or that the plaintiff did not act in good faith.

The defendant may have reason to complain of the negligence of its agent, but the consequences of his negligence should not be visited upon the plaintiff.

If the plaintiff and Brown were mutually negligent in failing to prosecute the inquiry, or if the former failed to exercise the vigilance of a cautious and prudent man in ascertaining the facts, the defendant cannot complain that he reposed an undue confidence in its agent.

The defendant undertook, for a valuable consideration, to insure the property of the plaintiff against loss by fire, for a term which had not expired when the loss occurred. It was for the defendant to show, that the contract had been terminated prior to that time.

The receipt did not, for the reasons stated, in equity extinguish the right of the plaintiff under the contract, nor was he estopped from claiming to recover in opposition to it.

The judgment should be affirmed with costs.

All concur. Judgment affirmed.

THE PEOPLE ex rel. J. HENRY PERKINS, Appellant, *v.* SIMEON S. HAWKINS, Supervisor of the town of Riverhead, in Suffolk county, Respondent.

Under the provision of chapter 436 of the Laws of 1870, a principal who has furnished jointly with a town of the county of Suffolk a substitute whose service constituted a part of the excess of years, for which moneys were received from the State, has a clear legal remedy by action against the town to recover his just proportion of such moneys. A mandamus, therefore, will not lie.

(Argued June 13th, 1871; decided September 2d, 1871.)

APPEAL from order of the late General Term of the second district, reversing an order of Special Term, which directed the issue of a peremptory writ of mandamus to defendant.

On the 23d August, 1864, at a special town meeting held in the town of Riverhead, the following resolution was adopted:

"*Resolved*, That the supervisor and committee be empowered, to raise a sufficient number of substitutes or volunteers, to fill the quota of the town on the best terms they can, and each person wishing to procure a substitute for himself shall pay $125 for three, or sixty dollars for one year, and the town pay the balance."

Under this resolution a substitute was furnished for relator for three years, relator paying $125. On the 22d May, 1865, said town received from the State $400 for the two years excess of service of said substitute. The average paid for three year substitutes was $684. In some instances as high as $1,000 was paid.

Robert Sewell, for appellant, that where a supervisor was authorized to pay, it was his duty so to do. (*People ex rel* v. *Supervisors, etc.*, 36 How., 1; *People ex rel.* v. *Supervisors*, 11 Abb., 114; *Mayor* v. *Furze*, 3 Hill, 612; *United States* v. *Supervisors*, 4 Wallace, 435; *City of Galena* v. *Amy*, 5 Wallace, 705.) That where officers refuse to do an act

required, a mandamus will lie. (*People* v. *Perry*, 13 Barb., 206; *Hull* v. *Supervisors of Oneida*, 19 John., 259; *People* v. *Supervisors of Albany*, 12 John., 414; *People* v. *Hawes*, 34 Barb., 69; *People* v. *Supervisors of Columbia*, 10 Wend., 363; *People* v. *Edmonds*, 19 Barb., 468; *People* v. *Supervisors of Chenango*, 8 N. Y., 317; *People* v. *Supervisors of N. Y.*, 32 N. Y., 473; *People* v. *Supervisors of Oswego*, 36 How., 1.) That mandamus will lie in some cases where there is a legal remedy by action. (*McCullough* v. *Mayor of Brooklyn*, 23 Wend., 459; *People* v. *Taylor*, 1 Abb., 200; S. C., 30 How., 78.)

Thomas S. Strong, for the respondent.

CHURCH, Ch. J. To entitle a party to a mandamus, he must have a clear legal right to the relief demanded. (*People* v. *Supervisors of Chenango*, 11 N. Y., 563, and cases cited.) By the act of 1870, chapter 436, the towns of the county of Suffolk are made liable, to refund a portion of the moneys received from the State, for certain excess of years' service for soldiers furnished during the late rebellion, to the principal who furnished *jointly with the town*, a substitute whose service constituted a portion of such excess. It is claimed by the relator, that he did furnish a substitute jointly with the town of Riverhead, and paid towards such substitute the sum of $125; that two years' excess of service of such substitute was credited to the town on the next call, for which the State reimbursed the town the sum of $400; and he claims $150 of that sum. On the part of the town, it is claimed, in substance, that by an arrangement between him and the town, the relator was to pay $125, and the town undertook to furnish a three years' substitute at whatever cost or expense; in other words, that the town assumed the burden of furnishing a substitute for the relator for $125. If the relator's construction is the correct one, the town is liable to him for some amount, assuming the validity of the act of 1870; but if the other construction is the correct one, then

the relator is not within the terms of the act, as he did not furnish a substitute jointly with the town or otherwise, and he is not entitled to any part of the reimbursement. It is unnecessary if not impracticable to determine which version is correct, as the proper mode of trying the question is by action, and it may depend upon other facts than those appearing before us. It is sufficient to say, that the legal right in favor of the plaintiff is far from being *clear*.

Nor will a mandamus lie, where the party has a plain legal remedy by action. (*Ex parte Lynch*, 2 Hill, 45.) An action against public officers for neglecting to perform their duty, would not be considered such a remedy as to supersede that by mandamus. (23 Wend., 461; *People* v. *Mead*, 24 N. Y., 114; 1 Ker., 563.)

If the relator's version is the correct one, he has a clear legal remedy by action against the town, declared by the act itself. It declares that the officers of the township shall pay the balance of the money (after reserving a certain portion to the town) to the principal, his heirs or assigns. Although it appears, that the town has paid out for municipal purposes all the money received, yet the liability of the town remains, and can be enforced by action. An action is the appropriate remedy also, because if the relator is entitled to anything the amount to which he is entitled is in dispute. He paid $125, and claims $150. It does not appear clearly what the town paid for the substitute. The average paid for substitutes was $684, and the town paid as high as $1,000 for some. The town received $400 from the State. The relator states that he paid $125 and received $375 from the town.

It appears that he was employed by the town authorities to assist in procuring substitutes, and I infer that the relator claims, that the town only paid $375 toward his substitute, and that the town is only entitled to the balance of that sum after deducting one-third for one year's service, which is $250, and that he is entitled, under the act, to the balance received from the State, being $150. This may be the true construction of the act, but the facts upon which the relator reaches

this result do not clearly appear. It is nowhere stated what amount the town paid for this substitute. Although the relator received only $375 from the town towards the substitute, the latter may have paid $1,000. We cannot say that injustice would not be done by reversing the judgment, and it must be affirmed. All concur.

Judgment affirmed.

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THE OCEAN NATIONAL BANK OF NEW YORK, Appellant, *v.* KATE G. OLCOTT and CORNELIUS OLCOTT, Respondents.

A certificate of discharge issued under the bankrupt act of 1867, cannot be impeached in a State court on the ground that it was improperly granted.

In an action brought after a debtor's discharge in bankruptcy, to enforce a lien upon property held by the debtor's wife, claimed to have existed at the time of the discharge, under the provisions of sections 51 and 52 of the statute of uses and trusts (1 R. S., Edmonds' ed., 677, §§ 51 and 52).

Held, that those sections do not give a specific lien upon the property, but an equitable right to be enforced by suit in equity, after all *available* legal remedies are exhausted; that the commencement of the equitable action and filing of *lis pendens* is necessary to constitute a lien, and that as in this case, before the commencement of such action, the judgment or debt, which is the foundation thereof, was extinguished, the relation of debtor and creditor did not exist, and the action would not lie.

McCartney v. *Bostwick*, 32 N. Y., 53, commented on.

(Argued June 7th, 1871; decided September 2d, 1871.)

APPEAL from judgment of the General Term of the first department, reversing an order of the Special Term, overruling demurrer to plaintiff's reply and sustaining demurrer to the fourth and fifth counts of defendant's answer.

This action is in the nature of a creditor's bill, on a judgment recovered by the plaintiff against the defendant, Cornelius Olcott, on the 15th of April, 1861. And the allegations in the complaint are, that since the judgment said defendant has paid, of his own moneys, for certain real estate, the conveyance of which was taken by and in the name of the defendant, Kate G. Olcott, the wife of the other defendant, in fraud

of his creditors. The answer denies all these allegations of fraud, and sets up the defence: That since the judgment, and before this action was commenced, the defendant, Cornelius Olcott, obtained a discharge in bankruptcy, under the act of congress of 1867, and was thereby fully discharged from all his debts, the aforesaid judgment included.

The plaintiff replied to the defence of the discharge in bankruptcy, alleging that said discharge was fraudulently obtained, and setting forth the frauds complained of.

The defendant demurred to the reply, that it does not state facts sufficient to constitute a reply.

P. J. Gage, for the appellant, that as the real estate was transferred to the wife in fraud of plaintiff's assignor, a trust results to the creditor. (1 R. S., Edmond's ed., 677, §§ 51 and 52; *Garfield* v. *Hatmaker*, 15 N. Y., 478, 479; *Wood* v. *Robinson*, 22 N. Y., 564–66; *McCartney* v. *Bostwick*, 32 N. Y., 53, 60; Bankrupt Act, § 33.) That the bankrupt act simply affects remedy, and does not discharge debtor. (*In re Sevy et al.*, 1 Bankrupt Regis., 66.) If plaintiff's judgment was a lien, it is not removed by a discharge obtained after such lien attached. (*Bates* v. *Tappan*, 3 Bankrupt Regis., 159; *Same Case*, 99 Mass. R., 376; *Bowman* v. *Harding*, 4 Bankrupt Regis., 5; *Same Case*, 56 Maine, 559; *Brewster* v. *Power*, 10 Paige, 562, 569; *Payne, et al.*, v. *Able, et al.*, 4 Bankrupt Regis., 67.) On trial of issue raised by demurrer to the reply, the plaintiff was at liberty to attack the answer for insufficiency. (*Holliday* v. *Noble*, 1 Barb. R., 153; *White* v. *Joy*, 13 N. Y. R., 83; *People, etc.*, v. *Booth*, 32 N. Y. R., 397; Code, §§ 144 and 148.) That all liens, *statutory*, as well as others, are protected and preserved by the bankrupt act. (See act, §§ 14 and 20 *In re Gregg*, 3 B. R., 131; *In re Scott*, 3 B. R., 181; *In re Wynne*, 4 B. R., 5.) That a party having a lien may enforce, after discharge granted. (*Jones* v. *Tellgett*, 39 Geo., 64.)

Richard H. Huntly, for the respondent, that if discharge in bankruptcy is not well pleaded, objection is waived by the

reply. (*Jenkins* v. *Stanley*, 10 Mass., 226.) That discharge cannot be attacked when pleaded as a defence. (*Chemung Canal Bank* v. *Judson*, 8 N. Y., 254; judiciary act of September 24, 1789; 1 Stat. at Large, 76, § 9; *Wheeler* v. *Raymond*, 8 Cowen, 311; *Caryl* v. *Russell*, 13 N. Y., 194, 198; *Brereton* v. *Hull*, 1 Denio, 75.) That discharge attacks the debt, and destroys all obligation for its payment. (*Ogden* v. *Saunders*, 12 Wheaton, 303; *McMillan* v. *McNeil*, 4 Wheaton, 209; *Farmers' and Mechanics' Bank of Penn.* v. *Smith*, 6 Wheaton, 131; *Ruckman* v. *Cowell*, 1 N. Y., 505; *Clark* v. *Rowling*, 3 N. Y., 216; *Dresser* v. *Brooks*, 3 Barb., 429; *Fox* v. *Woodruff*, 9 Barb., 498; *Depuy* v. *Swart*, 3 Wendell, 135; *Baker* v. *Wheaton*, 5 Mass., 509; *Moore* v. *Veile*, 4 Wendell, 420; *Dean* v. *Hewit*, 5 Wendell, 257, 262; *Martin* v. *Bush*, 16 Johnson, 233, 252; *Roosevelt* v. *Champlin*, 17 Johns., 108; *In the Matter of Daniel T. Wendell*, 19 Johns., 153; *Hubbell* v. *Cramp*, 11 Paige, 310; *In the Matter of Coates and Hillard*, 12 How. Pr., 344, 350, in Court of Appeals, 1856; *Tobias* v. *Rogers*, 13 N. Y., 59.) This action does not lie until all the remedies at law are exhausted, including return of execution. (*Mickles* v. *Brayton*, 10 Paige, 138; *Penniman* v. *Norton*, 1 Barb. Ch., 246; *Johnson* v. *Fitzhugh*, 3 Barb. Ch., 360; *Weed* v. *Pierce*, 9 Cowen, 722, 728; *Beck* v. *Burdett*, 1 Paige, 305; *Edmeston* v. *Lyde*, 1 Paige, 637; *McDermott* v. *Strong*, 4 Johns. Ch., 687, 691; *Corning* v. *White*, 2 Paige, 567; *Clarkson* v. *DePeyster*, 3 Paige, 319; *Utica Insurance Co.* v. *Power*, 3 Paige, 365; *Chautauqua County Bank* v. *White*, 6 N. Y., 236–252; *Storm* v. *Waddell*, 2 Sandf. Ch., 494.)

CHURCH, Ch. J. The two principal questions in this case are: 1. Whether a certificate of discharge in bankruptcy, issued under the bankrupt act of 1867, can be impeached in a State court, on the ground that it was improperly granted? and, 2. Whether the plaintiff can enforce the judgment, against the property conveyed to the defendant, Kate G.

Olcott, wife of the other defendant Cornelius Olcott, notwithstanding his discharge in bankruptcy?

The Constitution of the United States confers upon Congress, power to establish uniform laws on the subject of bankruptcies throughout the United States. This, like all other powers, is exclusive when exercised by congress. By the thirty-fourth section of the bankrupt act of 1867, a mode of attacking the discharge, is prescribed in the court which issued it, on the ground that it was fraudulently obtained. A creditor, therefore, seeking to invalidate the discharge for that reason, must pursue the remedy prescribed in the act. Otherwise the certificate is declared, to be "conclusive evidence" in favor of such bankrupt of the fact, and the regularity of the discharge. It follows that neither in any other mode, nor in any other court can the discharge be questioned, on the ground that it was improperly granted. Besides the plaintiffs have alleged in the reply, that they have made application to the United States court, to set aside the discharge for the frauds alleged to invalidate it in this case, and if the State court should entertain concurrent jurisdiction to try the same questions, a conflict of judgment and authority might result in a case clearly within the cognizance of the federal courts. In this respect the act of 1867, is unlike the act of 1841, which contained no provision for setting aside the discharge, but permitted its impeachment whenever it was interposed as a defence. We must therefore regard the discharge as valid for the purposes of this action.

The second point presents the important question in the case. It comes up on demurrer to the reply, and the plaintiff seeks to attack the answer, setting up the discharge, on the ground that it constitutes no defence to the action. In determining this question, we must take the allegations in the complaint as true. It is alleged, in substance, that after the plaintiff's debt was contracted, the defendant, Cornelius Olcott, purchased and paid the consideration for a large quantity of real estate, which was conveyed to his wife, and which, by this action, the plaintiffs seek to reach, for the purpose of

satisfying their demand. Judgment was obtained against Olcott before the bankrupt discharge was obtained, but this action was not commenced until after that time. A discharge in bankruptcy extinguishes the debt against the bankrupt. The judgment became extinguished, and the demands upon which it was rendered. (*Ruckman* v. *Cowell*, 1 N. Y., 505; *Depuy* v. *Swart*, 3 Wend., 135; *Baker* v. *Wheaton*, 5 Mass., 509.) In the language of the act, the discharge releases "the bankrupt from all debts, claims, liabilities and demands, which were or might have been proved against his estate in bankruptcy, and may be pleaded * * * * as a full and complete bar to all suits brought on any such debts, claims liabilities or demands."

It is claimed by the plaintiffs, that as creditors they had, by virtue of the fifty-first and fifty-second sections of the statute of uses and trusts, a lien upon the property held by the wife, the consideration for which was paid by the debtor, and that such lien existed at the time the discharge was granted, and was not affected by it.

Prior to the Revised Statutes, where the consideration for land was paid by one person, and the land was conveyed to another, a trust resulted to the person paying the consideration, and the interest of such person might be taken and sold on execution, and the legal title thereby transferred to the purchaser. (1 R. S., 74; *Guthrie* v. *Gardner*, 19 Wend., 414; *Jackson* v. *Walker*, 4 Wend., 462.) The Revised Statutes changed this rule, by providing in the fifty-first section, that no use or trust shall result in favor of the person by whom the payment is made, but that the title shall vest in the person named as alienee in such conveyance, subject only to the provisions of section 52, which declares that every such conveyance "shall be presumed fraudulent as against the creditors, at the time, of the person paying the consideration, and that when a fraudulent intent is not disproved, a trust shall result in favor of such creditors to the extent that may be necessary to satisfy their just demands." This change was probably made to prevent an evasion of the general policy of

the statute prohibiting trusts, except for a few specified purposes. It is obvious that the interest or right, or whatever it may be termed, secured to creditors by this statute, is an equitable interest, enforceable only in equity. A trust results, not of the whole property, but sufficient only to satisfy the just claims of creditors; not of one creditor only, but of all creditors. Except as against creditors, the title is perfect in the grantee, and as against them it is perfect, if the grantee can disprove a fraudulent intent. The rights of both creditors and grantee can only be properly adjusted and enforced, in a proceeding in equity, where all interested persons can be made parties, and a sale and proper distribution of the proceeds can be made. That this is an equitable and not a legal interest, to be enforced in a court of equity, was decided in this court in *Garfield* v. *Hatmaker* (15 N. Y., 475).

The bankrupt act preserves the rights of creditors by mortgage, pledge, or other lien upon the property of the bankrupt, and the assignee takes the property subject to it (sections 14, 20), and of course a valid lien against the property of a third person would not be affected by the discharge.

Although there may be some apparent confusion from the use of terms, I do not think the interest of the creditors constitutes a lien, within the meaning of the bankrupt act; nor in any such legal sense as to give creditors a priority, except by means of the usual equitable remedies. A lien is not a property in the thing itself, nor does it constitute a mere right of action for the thing. It more properly constitutes a charge upon the thing. (1 Story's Eq., § 506; 1 Burrill Law Dict., title "*Lien.*") In some general sense, creditors have an equitable lien upon the property thus situated. So they would have, if a general liability, instead of a resulting trust had been declared. So debts are an equitable lien upon property fraudulently transferred by a debtor; and it may be said that every debtor is a trustee for his creditors' and bound to use his property for their benefit, and that creditors have an equitable lien upon the property of the debtor. But in all these cases the usual remedies are to be pursued to create and enforce the lien before

a specific charge constituting an encumbrance is created. There is no mystery in the term *resulting trust*. After adopting the fifty-first section, it was indispensable to make some provision to preserve the rights of creditors, otherwise the grantee would have held the title absolutely against creditors and all others. Hence the fifty-second section was adopted, which placed the property in the same relation to creditors as it would have been, if the debtor himself had fraudulently transferred it, and the words used were appropriate for that purpose. The object of the statute was to cut off all interest in the person paying the consideration, and then to declare property liable for his debts; but this liability can only be enforced in the usual mode. A creditor at large cannot enforce the liability, without a preliminary judgment and execution. When the legislature transformed this from a legal into an equitable interest, we must presume that they intended, to apply equitable rules and principles existing at the time for its enforcement. One of them is, that before the equitable interests of a debtor can be reached in equity, all available legal remedies must be exhausted. It is not necessary to hold that such an action is, in strictness, a creditor's bill, and that jurisdiction depends upon a technical compliance with the statute. The general powers of a court of equity over trusts and frauds, may be conceded as sufficient to confer jurisdiction, but this concession does not dispense with the rule of equity, which existed prior to and independently of the statute, that creditors must exhaust available, legal remedies, before resorting to courts of equity to reach equitable interests. In 1 Paige, 305, the chancellor laid down the rule of equity established before the Revised Statutes, as follows: "There are two classes of cases where a plaintiff is permitted to come into this court for relief after he has proceeded to judgment and execution at law, without obtaining satisfaction of his debt. In one case the issuing of an execution gives to the plaintiff a lien upon the property; but he is compelled to come here for the purpose of removing some obstruction, fraudulently, or inequitably interposed, to prevent

a sale on the execution. In the other, the plaintiff comes here to obtain satisfaction of his debt, out of property which cannot be reached by execution at law. In the latter case, his right to relief here depends upon the fact of his having exhausted his legal remedies without being able to obtain satisfaction of his judgment." (*Wiggins* v. *Armstrong*, 2 J. Ch., 144, id. 283; *Brinkerhoff* v. *Brown*, 4 J. Ch., 671, and cases there cited.)

The foundation of courts of equity is to exercise jurisdiction, "in cases of rights recognized and protected by municipal jurisprudence, where a plain, adequate and complete remedy cannot be had in courts of law." (1 Story's Eq., Juris., § 33.) Legal remedies are the cheapest and most expeditious for creditors, and in this class of cases they protect both creditor and the person holding the title.

As between the grantor and debtor, the latter is bound, both in law and equity, to pay his debts from other property if he has it; and the dictates of propriety, as well as the established rules of equity, require that resort should in the first instance be had to such other property, if it can be reached by the ordinary process of law. This question is only pertinent in this case, as an argument to elucidate the nature of the interest of creditors under this statute. Although the indorsement of the execution "*nulla bona*" was not filed, it was actually made, which, with the other facts alleged, may be regarded a substantial compliance with the equity rule referred to. But neither the judgment nor execution constituted a lien upon equitable interests. The commencement of the equitable action and the filing of the *lis pendens* was necessary for that purpose. This is well settled in analogous cases. In *Edgell* v. *Haywood* (3 Atk., 357), Lord Chancellor HARDWICKE held, that a *bona fide* assignment of such property after judgment and execution would be valid, and added: "But after a bill brought, and a *lis pendens* created, as to this thing, such assignment could not prevail." (*Weed* v. *Pierce*, 9 Cow., 722; *Corning* v. *White*, 2 Paige, 567; *Spader* v. *Davis*,

5 J. Ch., 280; *Edmeston* v. *Lyde*, 1 Paige, 637.) Judge STORY lays down the general rule that, "courts will also enforce the security of a judgment creditor against the equitable interest in the freehold estate of his debtor, treating the judgment as in the nature of a lien upon such equitable interest. But *in all cases of this sort*, the judgment creditor must have pursued the same steps as he would have been obliged to do to perfect his lien, if the estate had been legal." (Story's Eq., Jur., § 1216; *Neate* v. *Duke of Marlborough*, 3 Myl. & Craig, 407, 415.)

The nature of the interest of creditors under this statute, and the remedy to enforce such interest, have not been definitely settled by the courts of this State. *Brewster* v. *Power* (10 Paige, 562) was a case where the only point involved, and the only one decided, was whether the plaintiff was and must be a creditor at the time of the conveyance, in order to avail himself of the interest secured to creditors under the statute. The chancellor dismissed the bill, but, in the course of his opinion, made the following remark: "I am not prepared to say that a judgment for such a debt would not create a preferable lien in equity upon such real property, except as against a purchaser for a valuable consideration."

In *McCartney* v. *Bostwick* (32 N. Y., 53), the plaintiff had prosecuted the defendant to judgment and execution in Minnesota, where he resided, and then commenced an action in this State, to reach property which had been paid for by the debtor and transferred to his wife.

I infer from the opinions that the court declined to decide, whether in such a case it was necessary to exhaust the legal remedies. At all events, such is the most favorable construction of the case for the plaintiffs.

PORTER, J., who delivered one of the opinions, said: "The case presented being one of pure trust, we are not prepared to say that the action might not have been maintained without recourse in the first instance to all attainable legal remedies against the principal debtor; but it is unnecessary to determine this question, as the fact is admitted that all remedies at

law were exhausted against the debtor in the State in which he resided, and that in this State no legal remedy was available." DAVIS, J., who also delivered an opinion, said: "The case is an anomalous one. There exists concededly in the farm held by the respondent a pure trust in favor of the appellants. But to reach and apply this trust estate, a general rule of equity requires that they should have exhausted their legal remedy." The case was decided upon the ground that the plaintiffs had exhausted all available legal remedies, and that the court would entertain jurisdiction by virtue of its inherent equitable powers.

The opinions of the learned judges in the two cases referred to, although not at all decisive, and not very explicit upon the main point, are not antagonistic to the views above expressed. The most that can be said is that one or two of them entertained an undefined impression that the words "resulting trust," as used in this statute, meant something more than a declaration that the property was liable for existing debts, to be enforced in the mode prescribed for reaching other equitable interests.

The learned chancellor was not prepared to say but a judgment might constitute a "*preferable lien;*" but as it was unnecessary to decide it, he refrained from expressing an opinion, and PORTER, J., was not prepared to say but the claim might be enforced without resort to any legal remedies, but he expressly declined on behalf of the court any intention to determine the question, while DAVIS, J., held that although the court could exercise jurisdiction independently of the statute, the general rules of equity required that the legal remedies should be exhausted. The decision in both cases was undoubtedly right, and it is quite unnecessary in this case to criticise any of the intimations. The question of a lien was not involved in either case. If it should be conceded that it was not indispensable to exhaust the legal remedies, and that an action would lie by a creditor at large, no lien would exist until an action was actually commenced for that purpose. The statute does not restrict the creditor to this property. It

gives him a right to pursue the property in the hands of the fraudulent grantee, but he is not obliged to do so; and until he takes some decisive legal step evincing his purpose to do so, no lien is created, any more than would have been, upon property fraudulently transferred by the debtor himself.

The harmony and analogies of the law are better preserved, by requiring all available legal remedies to be resorted to, as a preliminary requisite to an action for the application of the trust property. It is difficult to perceive any distinction, or any reason for it, between the rights of creditors as to property fraudulently transferred by the debtor himself, and property paid for by him and transferred to a third person. Why should creditors have different and superior rights to enforce their debts, in the latter case, to those enjoyed in the former? I can see no reason for any distinction, and I do not believe the statute has created any. But, in either case, the commencement of an equitable action is necessary to constitute a lien or charge, in any legal sense, upon the land.

These views dispose of the plaintiffs' case. The judgment, or debt, is the foundation of this action. Both were extinguished before the action was commenced. The plaintiffs sought to enforce and secure a lien against this property, by virtue of their rights as creditors. The debt having been discharged, they were not creditors, and could not avail themselves of the resulting trust, which was secured to creditors only. That relation must exist at the time of the conveyance, and at the time when the action is commenced, to establish the lien.

The judgment must be affirmed.

All concur, except GROVER, J., dissenting.

Judgment affirmed.

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MICHAEL HIGGINS, Respondent, *v.* THE WATERVLIET TURNPIKE AND RAILROAD COMPANY, Appellant.

A master is responsible *civiliter* for the wrongful act of a servant, if such act was committed in the business of the master, and within the scope of the servant's employment; and this, though in doing it, he departed from the instructions of the master.

Therefore, where the employee of a railroad company (a conductor), under a mistake of facts, or of judgment, ejected a person from the car in which he was a passenger, which act was not justified by the passenger's misconduct.—*Held*, that the company was liable. So, also, where there was justifiable cause for ejection, but excessive force was used (not wantonly or maliciously). *Hibbard* v. *N. Y. and E. R. R. Co.*, 15 N. Y., 467, explained.

(Argued May 30th, 1871; decided September 2d, 1871.)

APPEAL from the judgment of the late General Term in the third judicial district, affirming the judgment entered upon a verdict at the Albany circuit, in favor of the plaintiff.

On the 13th day of July, 1866, plaintiff was a passenger on defendent's horse car in the city of Albany. He had paid his fare, and was forcibly thrown from the car by defendant's conductor and driver, who claimed that he was drunk and disorderly. He gave evidence tending to show this was not so, and the jury so found.

The court charged the jury, "that if the defendant used more force than was necessary, the company, and not the conductor, is liable for that and for the consequences." Also, that, "If the conductor was wrong, and acted without legal authority, then the company was liable for all the consequences resulting from the act."

To both which propositions defendant's counsel excepted.

The defendant's counsel requested the court to charge, "that the plaintiff cannot recover in this action, for any personal injuries occasioned by any assault upon him by Richardson, the conductor, or Beach, the driver, or either of them, there being no evidence of any authority from the company to

do it." Also, "that the plaintiff is not entitled to recover, in this action, any damages against the defendant, beyond those arising from its breach of contract, to convey the plaintiff to his place of destination."

The court refused so to charge, and defendant's counsel excepted.

Samuel Hand, for appellant, that the servant, and not the company, is liable for excess of force, *Hibbard* v. *N. Y. and E. R. R. Co.* (15 N. Y., 467, 468); 23 N. Y., 347; *Crocker* v. *New London R. R.* (24 Conn., 249, 265); Pierce on Railroad Law, 254; *Lowell* v. *Boston and Lowell R. R.* (23 Pick., 31); *McManus* v. *Crickett* (1 East, 106); *Vanderbilt* v. *Richmond T. Co.* (2 Comst., 479); *Wright* v. *Wilson* (19 Wend., 343); *Green* v. *McNamara* (8 C. B. N. S., 880); *Roe* v. *Birkenhead, etc., R. R.* (7 Exch., 36); *Brickner* v. *Frowart* (6 T. R., 659). The company is not liable for the assault, not having expressly or impliedly authorized it. (*Wright* v. *Wilcox*, 19 Wend., 343; *Hibbard* v. *E. R. R. Co.*, 15 N. Y., 455; *Lyons* v. *Martin*, 8 A. & E., 512; *Mall* v. *Lord*, 39 N. Y., 381; *Church* v. *Mansfield*, 20 Conn., 287; *Thomas* v. *H. R. R. Co.*, 24 Conn., 54; *De Camp* v. *Miss. R. R. Co.*, 12 Iowa., 348; *Ayerigg's Ex.* v. *N. Y. R. R.*, 1 Vroom., N. J., 460; *Haack* v. *Fearing*, 35 How., 459.)

Anson Bingham, for the respondent. That principal is liable for malfeasance or misfeasance of agent. (Story on Agency, § 452; 1 Black Com., 429, 431; *New Orleans R. R. Co.* v. *Allbritton*, 38 Miss., 242; *The Vicksburg and Jackson R. R. Co.*, 31 Miss., 156; *Camp* v. *Miss., etc., R. R Co.*, 12 Iowa, 348; *Milwaukie R. R. Co.* v. *Finney*, 10 Wis., 388; *Echols* v. *Dodd*, 20 Texas, 190; *New Orleans R. R. Co.* v. *Bailey*, 40 Miss., 395; *Sharp* v. *New York*, 40 Barb., 256; *Wright* v. *Wilcox*, 19 Wend., 343; *Joel* v. *Morrison*, 8 Car. & *P.*, 501; *Weed et al.* v. *Panama R. R. Co.*, 17 N. Y., 362; *P and R. R. R. Co.* v. *Derby*, 14 How. U. S., 468; *Brown* v. *N. Y. C. R. R. Co.*,

34 N. Y., 412; *Mulhado* v. *Brooklyn C. R. R. Co.*, 30 N. Y., 370; *Drew* v. *Sixth Ave. R. R. Co.*, 26 N. Y., 49; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 448; *Goddard* v. *G. and R. Co.*, 57 Maine, 20, 26; Jurist, N. S., part 2, p. 143; *Pa. R. R. Co.* v. *Van Diver*, 42 Penn., 366.)

ANDREWS, J. Upon the theory that the act of the conductor, in removing the plaintiff from the car, was unlawful, and was not justified by the circumstances, the court was requested by the counsel for the defendant, to charge the jury, that the plaintiff could not recover for any personal injuries occasioned by the assault of the conductor, there being no evidence of authority from the company to commit it.

Upon the other theory of the case, that the expulsion was justified by the conduct of the plaintiff, but that unnecessary force, occasioning injury, was used in ejecting him. The court charged, that the defendant was liable for such injury.

Exception was taken by the defendant to the refusal of the court to charge as requested, and to the charge made. These exceptions present the questions made upon the argument.

The main contention on the trial, related to the conduct of the plaintiff, immediately before his removal from the car.

The evidence on the part of the defendant tended to show that he was noisy and disorderly; that he refused to obey the reasonable directions of the conductor, and that his expulsion was justified by his misconduct.

This version of the facts was controverted by the plaintiff, and we cannot decide, as a question of law, that the jury were not justified in finding with the plaintiff upon this issue.

But there is no evidence, that the act of the conductor was prompted by malice, or any wrongful intention, or by any motive, except to discharge what he supposed to be his duty under the circumstances. The request to charge must be regarded, as having been made with reference to this view of the facts, otherwise it was irrelevant and inapplicable to the case.

The expulsion of the plaintiff, if not justified by his misconduct, was an unlawful assault, and the question arises, whether the defendant is responsible for the injury occasioned by the unlawful act of its servant, done under a mistake of facts, or a mistake of judgment upon the facts, though in the course of the business of his master.

This question must be answered in the affirmative, in view of the nature of the service, in which the conductor was engaged, and the principle upon which the liability of the master for the acts of the servant rests.

The conductor was put by the defendant in charge of the car. Passengers were bound to conform to the reasonable rules and regulations of the company, and to behave themselves in an orderly manner, promoting thereby the mutual interest of the company and the public.

The company had the right to enforce order and decency, by expelling from the car a passenger guilty of disorderly and indecent conduct.

The defendant could only act through agents. The appointment of a conductor carried with it as an incident, authority to maintain order, and to eject a passenger who had forfeited his right to be carried by his misconduct.

This authority, it is true, was confined to the expulsion of persons who, in fact, misbehaved themselves so as to justify their expulsion; but whether, in a given case, the misconduct was such as to justify an expulsion, must necessarily be determined at the time of the transaction.

The duty of deciding is cast upon the conductor; he represents the defendant; he may misunderstand or misjudge the facts; he may act unwisely or imprudently, or even recklessly; but the business of preserving order and enforcing the regulations of the company is committed to him, and for his acts in that business the company is responsible.

The master's liability for the negligence or tort of his servant, does not depend upon the existence of an authority to do the particular act from which the injury resulted. In most cases where the master has been held liable for the negligence

of his servant, not only was there an absence of authority to commit the wrong, but it was committed in violation of the duty which the servant owed to the master. The principal is bound, by a contract made in his name by an agent, only when the agent has an actual or apparent authority to make it; but the liability of a master for the tort of his servant, does not depend primarily upon the possession of an authority to commit it. The question is not solved by comparing the act with the authority.

It is sufficient to make the master responsible *civiliter*, if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant, in doing it, departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant, the obligation is not changed.

The omission of such care by the latter, is the omission of the principal, and for injury resulting therefrom to others, the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the agent, the maxim *respondeat superior* applies, provided only, that the agent was acting at the time for the principal, and within the scope of the business intrusted to him.

It is often stated, and with sufficient accuracy for general purposes, that a master is not liable for an assault committed by his servant.

It is said by Lord KENYON, in the leading case of *McManus* v. *Crickett* (1 East, 106), "that when a servant quits sight of the object for which he was employed, and, without having in view his master's orders, pursues that which his own malice suggests, his master will not be liable for such acts." If for his own purposes, and not in his master's business, the servant commits an assault, the master is not responsible; and the

statement, that the master is not liable for the assault of his servant requires this qualification.

In the case of *Sandford* v. *Eighth Avenue Railroad Company* (23 N. Y., 343), the action was brought to recover damages, resulting from the death of the plaintiff's intestate, caused by his being thrown from the car of the defendant, by the conductor, when it was in motion. The deceased refused to pay his fare, and for that reason the conductor ejected him. The court held that the conduct of the intestate, justified the conductor in expelling him from the car in a proper manner, but not when the car was in motion, and the defendant was held liable for the injury. COMSTOCK, Ch. J., says: "The case is, therefore, to be stated thus: The defendants by their servant were guilty of a personal and intentional assault upon the intestate. The assault, as we think, was not in law justified by the fact, and they are consequently without a legal defence."

This case is in point against the defendant upon the question we have considered, and accords with the general principle, governing the liability of masters for the tortious acts of their servants. (Addison on Torts, 23; Smith on Master and Servant, 151; Story on Agency, § 452.)

The charge of the court that the defendant was responsible, for the excessive force used in ejecting the plaintiff from the car, assumed that there was lawful cause for his expulsion. The charge, in our opinion, was, under the proof in the case, correct, and is supported by the considerations, to which we have adverted, in considering the other exception.

We are not called upon in this case, to determine what the law is as to the master's responsibility, in a case where a conductor, though justified in using violence in expelling a passenger, wantonly and intentionally used unnecessary force to accomplish it, and where the justifiable and excessive force were parts of a single act. In this case that hypothesis is inadmissible. The evidence does not warrant the supposition that the conductor acted in bad faith or wantonly used unnecessary violence.

In *Seymour* v. *Greenwood* (7 H. & N., 356), it was held by the Court of Exchequer Chamber, that a master was liable for an injury caused, by the unlawful and violent conduct of his servant, in the performance of an act within the course of his employment. The case in its circumstances was quite like the case in question. The guard of the defendant's omnibus, in removing a passenger whom he deemed to be drunk, forcibly dragged him out and threw him on the ground, whereby he was severely injured. The passenger brought an action for the injury, and the defendant claimed, that he had not authorized, and was not liable for the acts of the servant. WILLIAMS, J., in pronouncing the unanimous opinion of the court, said: "We think there was evidence for the jury that the guard, acting in the course of his service as guard of the defendant's omnibus, and in pursuance of that employment, was guilty of excess and violence not justified by the occasion, or in other words, misconducted himself in the course of his master's employment, and, therefore, the master is responsible. It is said, that though it cannot be denied, that the defendant authorized his guard to superintend the conduct of the omnibuses generally, and that such authority must be taken, to include an authority to remove any passenger, who misconducts himself, yet the defendant gave no authority, to turn out an inoffensive passenger, and the plaintiff was one. But the master, by giving the guard authority, to remove an offensive passenger, necessarily gave him authority to determine whether any passenger had misconducted himself. It is not convenient for the master personally to conduct the omnibuses, and he puts his guard in his place, therefore, if the guard forms a wrong judgment the master is responsible." (See, also, *Limpas* v. *London General Omnibus Company*, 1 H. & Colt., 526; *Goff* v. *Great Nor. R'way Co.*, 30 L. J., Q. B., 148; *Poulton* v. *London and South Western R'way Co.*, 2 L. R., 2 Q. B., 534.)

The remark of one of the judges in the case of *Hibbard* v. *New York and Erie R. W. Co.* (15 N. Y., 467), may not,

when read in connection with the charge to which it referred be consistent with the views here expressed. But the case was decided upon another point, and it is not an authority for the doctrine stated by the learned judge.

The judgment should be affirmed.

All concur, but PECKHAM, J., not voting.

Judgment affirmed.

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EMMA HOFFMAN, Respondent, *v.* WILLIAM HOFFMAN, Appellant.

A decree of divorce obtained in another State, the defendant not being served with process, and both parties at the commencement of the suit and during its pendency being residents of this State, is invalid.

An attempt by the defendant in such suit, made in a court of the State where decree was granted, to set it aside, which was defeated upon technical grounds solely, does not affect the question.

The record of such decree is not conclusive as to jurisdiction, but the facts therein stated giving the court jurisdiction may be disputed. This rule is not in conflict with section 1, article 4, of Constitution of the United States.

(Argued June 4th, 1871; decided September 2d, 1871.)

APPEAL from judgment of the late General Term of the first judicial district, affirming judgment entered upon decision of the court in favor of plaintiff.

The action is brought for a divorce upon the ground of adultery. The answer admits the adultery, but sets up a decree of divorce obtained by defendant in the State of Indiana. The facts appearing upon the trial are sufficiently stated in the opinion.

L. J. Chatfield, for the appellant, that under the Constitution of the United States (section 1, article 4) the Indiana decree was valid and binding here, *Mills* v. *Duryea* (7

Cranch, 481); Constitution, art. 4, § 1; *Kemp's Lessee* v. *Kenedy* (5 Cranch, 173); *Mayhew* v. *Thatcher* (1 Whea., 129); *Cheever* v. *Cheever* (9 Wallace, 108); 9 Pet., 8; 10 Pet., 449; *The Mary*, 9 Cranch, 126; 3 Cranch, 300; *Black* v. *Black*, Bradf. That such former adjudication is a bar. (*Neafie* v. *Neafie*, 7 John. Ch., 1; *Perine* v. *Dunn*, 4 id., 140; 2 Comst., 113; 4 Johns. Ch., 199; *Noyes* v. *Butler*, 6 Barb., 113.)

E. M. Wright, for respondent, that the Indiana decree was void for want of jurisdiction, Laws of Indiana, fol. 200; *Shannon* v. *Shannon* (Am. Law Reg. 1863, 180); S. C., 10 Allen Mass. R., 249; *Frost* v. *Brisbin* (19 Wend., 11); *Chaim* v. *Wilson* (1 Bosw., 673); *Borden* v. *Fitch* (15 Johns., 151); *Bradshaw* v. *Heath* (13 Wend., 406); *Jackson* v. *Jackson* (1 Johns., 424); *Vischer* v. *Vischer* (12 Barb., 640); *McGiffert* v. *McGiffert* (31 Barb., 69); *Kerr* v. *Kerr* (41 N. Y., 272); *Sturgis* v. *Fay* (16 Ind., 429); *Beard* v. *Beard* (21 Ind., 321); *Forrest* v. *Forrest* (25 N. Y., 501).

PECKHAM, J. There is but one question in this case. Is the judgment of divorce, obtained by the defendant against the plaintiff in the State of Indiana, of any force here? From the facts as found by the referee, and sustained by the proof, it appears that on the 7th day of April, 1857, the defendant applied to a court in Indiana for a divorce, and obtained a judgment therefor on the fifth of June following, within two months after presenting his petition. He obtained it upon the ground of adultery committed by this plaintiff.

But at the time of commencing his suit there, and while it was pending, both parties resided in the city of New York. No process was served upon this plaintiff in that suit; it appears she had no knowledge of it, and authorized no appearance in it.

Her subsequent attempt by a suit in the courts of Indiana, to set that judgment aside for fraud, has no bearing upon this

question. Though she succeeded at the trial, and obtained the decree upon the ground, that he had obtained a divorce upon the indispensable fact that he was a *bona fide* resident of that State, when in truth he was not, but then resided in this State, this judgment was set aside upon appeal, for the reason that the party was confined by statute to a motion for a new trial in a court of law, and must comply with the provisions of their statute on that subject.

It thus appears that this defendant obtained this judgment in Indiana by fraud. By fraud upon the laws of that State as well as of this. The statutes of that State require that a party in such case, in order to be entitled to this relief, should be "at the time a *bona fide* resident of the county in which the petition is filed." (Act of 1852, § 6.)

The obvious reason why he went to that State was, because he had condoned the offence, and in answer to a suit here, it would have been proved. It was equally an answer in Indiana; hence the necessity of obtaining the judgment without any notice to the wife.

It is impossible to sustain this Indiana judgment, without coming in conflict with every decision of our own courts touching this question. (*Kerr* v. *Kerr*, 41 N. Y., 272, and cases there cited.)

A contract of marriage, regarded in this State as a solemn obligation, is a mere farce if it can thus be dissolved.

The dissatisfied party need only take the cars for another State, and upon alighting there may at once institute proceedings for divorce. Residence for no particular time seems then to have been required in Indiana, only a "*bona fide* residence."

It is almost necessarily an *ex parte* proceeding, where the other party, as here, resides in New York. In such case the statute of Indiana requires notice of the petition to be published, once a week for three weeks "in some weekly paper of general circulation, printed and published in such county; or, if there be no such paper, then in the one printed and published in this State, nearest to the county seat of such county." (Act of 1852, § 11, Laws of Indiana.)

There is no probability that such a notice would reach the opposite party.

The State might as well have enacted, that a divorce might there be procured by a *bona fide* resident, without any notice whatever to a non-resident, upon proof of the required facts. Honest justice would be thus quite as well attained.

Is the record of this judgment conclusive upon the courts of this State?

It is the settled doctrine of this State, that such record is not conclusive as to the question of jurisdiction.

It is not conclusive even though it states facts, which give the court jurisdiction; but these alleged facts may be shown to be untrue. (*Mills* v. *Duryee*, 2 Am. Lead. Cases, 725, note, and cases cited; *Shumway* v. *Stillman*, 6 Wend., 447; *Starbuck* v. *Murray* 5 Wend., 148; *Noyes* v. *Butler*, 6 Barb., 613; *Kerr* v. *Kerr*, *supra*.)

There are authorities in some States against this position, holding that statements in a record of a sister State are conclusive. In the United States Court, Mr. Justice CLIFFORD, in *Christmas* v *Russell* (5 Wall., 290), said that such judgments "are open to inquiry as to the jurisdiction of the court and notice to the defendant."

In *Cheever* v. *Wilson* (9 Wall., 108, 123), Mr. Justice SWAYNE, after stating that the fact, that the petitioner did reside in the county (in Indiana) where the petition was filed, is expressly found by the decree, remarked, "whether this finding is conclusive or only *prima facie* sufficient, is a point on which the authorities are not in harmony. We do not deem it necessary to express any opinion upon the point."

In holding this record void in the courts of this State under the facts, it is not intended, in any degree, to impair the force of the federal Constitutional provision, "that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State."

That provision was never intended to embrace a case like this. The Constitution did not mean to confer a new power or jurisdiction, but simply to regulate the effect of the

acknowledged jurisdiction over persons and things within the State. (Story's Com. on Con.; *Mills* v. *Duryee*, 2 Am. L. cases, 623, note.)

The necessary effect of sustaining this decree would be, to allow any other State substantially to make laws for this State; to regulate not only our domestic relations of husband and wife, but almost every other right.

A court has no more authority to assume jurisdiction over a marriage contract than over any other subject, without due service of process or the appearance of the party defendant.

Had the husband instituted his suit for divorce in this State, instead of Indiana, he could not have obtained a decree therefor upon the facts found in Indiana. Here he must state, under oath, that he has not voluntarily cohabited with the defendant since the discovery of the adultery. In that State it is made matter of defence, but the plaintiff is not required to make oath in regard to it.

For the reason, therefore, that the court in Indiana had no jurisdiction of the subject of the action, as the plaintiff in that action was, in fact, a resident of this State at the time he claimed to have resided there, and went to Indiana only to obtain this decree, and the defendant therein, was during all the time a resident of this State, was never served with process or appeared in that action, the decree therein cannot be enforced here, but must be held void. This decision may operate harshly upon innocent parties, but it cannot affect the rule of law.

Judgment affirmed, with costs.

All concur.

SAMUEL R. CHILDS, Appellant, *v.* EZEKIEL S. SMITH, Respondent.

Plaintiff sold and conveyed certain real estate to defendant; a part payment was agreed to be made in cash, when a certain contemplated corporation should be formed. — *Held*, that the organization of the corporation

Statement of case.

was not the event which fixed the fact of the indebtedness, but it only marked the time, when the payment of such indebtedness might be exacted, and that such corporation was formed, in the contemplation of the contract, when such acts were done among the associates as would form and set on foot, in practical existence, a body in which they would have rights, and to which they would owe obligations, although no statutory organization had been perfected.

(Submitted May 30th, 1871; decided September 2d, 1871.)

APPEAL from the judgment of the late General Term of the Supreme Court in the fourth judicial district, reversing a judgment entered in Saratoga county upon report of referee in favor of plaintiff, and granting a new trial.

In April, 1867, plaintiff was the owner of 150 acres of land situated about two miles east of Saratoga Springs, upon which were two mortgages for about $10,000 in the aggregate. Fifty acres of the farm were thought valuable for the manufacture of brick and peat. On the 18th April, 1867, plaintiff conveyed the farm to defendant subject to the encumbrances, upon a parol agreement of sale for $20,000, by which defendant was *to assume and pay the two mortgages of* $10,000; $2,000 to be allowed for four acres reserved by plaintiff; $5,000 to be deducted for one-fourth interest in the fifty acres of peat land to be held by plaintiff, and $3,000 to be paid in cash, of which $1,000 was to be paid in a few days, and $2,000 *when the brick and peat company should be organized.* That company to be formed was, to operate upon said fifty acres with a capital of $150,000, of which $70,000 was to be retained as working capital; $20,000 was to belong to plaintiff; $40,000 to defendant, and $20,000 plaintiff was to take when the company was organized, and pay defendant therefor $5,000. The contract was changed and modified several times as stated in the opinion. *Defendant took possession of the farm on the delivery of the deed and leased it for farming purposes, reserving the fifty acres.* He paid his $1,000 in a note and drafts. He immediately drafted articles for the organization of a company, for the aforesaid purpose under the statute, which were executed and acknowledged by these parties; and

by *Wm. B. Laithe*, who at once met as a corporation, elected officers, defendant being present, adopted by-laws proposed by defendant, all of which proceedings, were entered upon a book purporting to be a record of the corporation. Steps were taken to prepare the ground and procure a machine for commencing the manufacture. The articles of incorporation were delivered to *Mr. Laithe*, by direction of defendant, to be filed with the secretary of State; but they were not filed in that office, nor any duplicate, with the county clerk. Defendant neglected to pay the interest on the said mortgages. They were foreclosed in July, 1867. After the sale the incorporation was abandoned.

Upon these facts the referee decided defendant was liable for the $2,000.

W. A. Beach, for appellant, that for all purposes of corporate business the company was organized. (*Springsteen* v. *Sampson*, 32 N. Y., 703.) That corporate character of company could not be questioned by defendant. (*The B. and A. R. R. Co.* v. *Cary*, 26 N. Y., 75; *Eaton* v. *Aspinwall*, 19 N. Y., 119; *Doyle* v. *Petroleum Co.*, 44 Barb., 239; *Tarbell* v. *Paige*, 24 Ill., 46; *Moses* v. *Breling*, 31 N. Y., 462.)

J. H. Shoudy, for the respondent, that the contemplated corporation never had an existence *de jure* or *de facto*. (*M. E. Union Church* v. *Picket*, 19 N. Y., 482; *Eaton* v. *Aspinwall*, 19 N. Y., 119; *Bank of Toledo* v. *International Bank*, 21 N. Y., 542; *B. and A. R. R. Co.* v. *Cary*, 26 N. Y., 75.) That defendant is not estopped from denying incorporation. (*Welland Canal Co.* v. *Hathaway*, 8 Wend., 480; *Burt* v. *Farrar*, 24 Barb., 518; *Kingman* v. *Sparrow*, 1 N. Y., 242; *Frost* v. *Koon*, 30 N. Y., 428; *Shapley* v. *Abbott*, 42 N. Y., 443.)

FOLGER, J. The contract between the parties, as it stood at the commencement of this action, was not formed at once, but was the result of several changes and modifications. In

the first instance (if we take the testimony on which the learned referee seems to have relied), the plaintiff agreed to sell his farm of 150 acres and convey it to the defendant, for the consideration of $20,000. The consideration was to be paid; by the defendant assuming two mortgages upon the premises, which, with accrued interest, were called $10,000; by an exception to the plaintiff from the premises conveyed of four acres, called $2,000; by cash $3,000, to be paid to plaintiff by defendant; and by one quarter interest in a company to be formed to work the clay and peat in fifty acres of the premises, called $5,000; the stock of the company to be $150,000; $70,000 of which was to be reserved as working capital, and $80,000 to be allotted to the parties; one quarter to the plaintiff as part of the consideration of his conveyance, two quarters to the defendant, without payment from him, and another quarter to the plaintiff, for which he was to pay the defendant $5,000 on the organization of the company.

It will be seen that, by this agreement, the defendant obtained the title to the whole farm, save the four acres reserved, upon assuming the payment of the mortgages and interest, and paying $3,000 in cash, and that, practically, he at once resold to the plaintiff a quarter of fifty acres for $5,000. All that the plaintiff gained, was the freeing of the four acres from the lien of the mortgages, the $3,000 in cash, and the securing of an associate in a company to work the clay and peat in the fifty acres, and for this he was to pay $5,000 in cash. And it is important to observe, that here was an absolute and unconditional agreement on the part of the defendant, to pay the whole of the $3,000 upon the delivery of the conveyance.

The first modification of the contract, was as to the time of payment of the $3,000 by the defendant. He was not thereby released from his obligation to pay it, but the time when he was to pay was changed. One thousand dollars was to be paid in a few days after the delivery of the conveyance, and $2,000 when the company should be organized. Manifestly, the organization of a company, was not a condition precedent to

his being obligated to pay. But that expression was used, as a convenient designation of a time when his obligation, already fully incurred and existing, should become matured and enforceable against him.

If the parties meant such an organization as would create a corporation *de jure*, which could successfully maintain itself against an inquiry on the part of the State, then it is evident that the time had not, at the commencement of this action, arrived, at which the $2,000 became due and payable. For the parties had neglected to file certificates of association, in accordance with law. (Laws of 1848, chap. 40.)

But the obligation, at some time, to pay the sum of $2,000, did not rest upon the organization of the corporation either *de jure* or *de facto*. The consideration of the promise to pay that sum, was the conveyance by the plaintiff to the defendant of certain real estate. The conveyance the plaintiff had made and delivered. He had parted with his property and had become entitled to his compensation therefor, at some time. And the organization of a corporation, was not the event which should fix the fact of the indebtedness of the defendant to the plaintiff, but only mark the time when a solution of that indebtedness might be exacted. The conveyance made and delivered, the defendant owed to the plaintiff $3,000; $1,000 thereof was payable in a few days thereafter, and $2,000 thereof could be lawfully demanded when the company was organized.

It seems, then, too strict and technical to hold, that the parties meant that the time of payment would not arrive, until there should be an organization so exactly in accordance with the statute, as that it would successfully meet any scrutiny into its right, which the sovereign power could institute. It is rather to be held, that they meant such acts and doings among the associates, as should form and set on foot, in practical existence, a body in which they should have rights, and to which they would owe obligation, and through which they should possess rights against, and incur obligations to, each other.

This they did. They signed certificate of incorporation; they adopted by-laws; they elected officers; they had, as a corporation, a place of business. The basis on which the company should become the owner of the real estate was agreed upon, and the amount of stock which each associate was to take was agreed upon.

In our opinion, here was an organization of the company sufficient to meet the meaning of the parties, and to make payable the $2,000 agreed to be paid by the defendant.

And here there came in another modification of the contract. By it, the fifty acres of clay and peat land, was by the defendant, to be conveyed to the company subject to the two mortgages. Thus, the defendant would have the clear title to the whole farm, save the four acres reserved to the plaintiff, and the fifty acres to be conveyed to the company, and paying the plaintiff $3,000, and receiving from him $5,000 for one quarter of the stock, would also have made a gain of $2,000 in money. But as this would have been unconscionable, the further modification was also made, that the defendant should also convey, without price to the company, the timber and lumber already prepared for use, and the right to use a certain patent brick machine; and the distribution of the $80,000 of stock was changed so that the plaintiff should receive but the one quarter, which formed a part of the consideration of his conveyance. The defendant should receive the two quarters, but one of them should be held, used, or sold for the benefit of the company, and he should pay into the treasury of the company $5,000. The quarter which was to be taken by the plaintiff, and for which he was to pay $5,000, was to be issued to one Laithe, an associate in the company, for which he was to pay into the treasury $5,000.

Thus the defendant would retain his clear title to two-thirds of the farm, and hold one-fourth of the $80,000 of stock upon paying the plaintiff $3,000, and giving to the company $5,000, and the personal property above mentioned. The testimony of the defendant is, that the farm was worth from seventy-five dollars to eighty dollars, per acre, which would make the two-

thirds worth $7,500. This does not seem an unreasonable arrangement for the parties to make.

Now the referee has found in these terms: "that the $20,000 of stock, which by said agreement was to be taken by the plaintiff, and $5,000 paid therefor, was by the arrangement of the parties, assumed and taken by the said Wm. B. Laithe." Which finding, we, in the light of the testimony on which it is based, construe to mean that this associate, Laithe, was to take the one-fourth of the stock, and pay for it the $5,000, which the plaintiff had agreed to pay; and that thus the plaintiff was relieved from his obligation to pay that sum to the defendant. It is to be observed that the arrangement was made by the parties, the defendant, of course, being one, and assenting thereto. It is not to be inferred that this assent was merely that Laithe, the associate, who took the fourth of the stock off the hands of the plaintiff, was to pay the plaintiff, and the plaintiff still be liable to the defendant therefor. The paper in the handwriting of the defendant which expresses the arrangement, shows how Laithe was to pay for the fourth part. He was to pay $5,000 into the treasury of the company, not to the plaintiff. It is not supposable that he was also to pay another $5,000 to the plaintiff. It is apparent, that with the concurrence of the defendant, Laithe took the place of the plaintiff, as the subscriber for the fourth part of the stock, and was to pay the price thereof into the treasury. By this arrangement the plaintiff was discharged from his liability, to pay to the defendant $5,000 upon the organization of the company. But the liability of the defendant to pay the plaintiff the $2,000 still existed; and as we have stated, was matured and enforceable. It follows, then, that the plaintiff had a right of action therefor, against the defendant, and that the learned referee did not err in rendering judgment in his favor.

Upon the points of the respondent, appear several objections to the rulings of the learned referee, in the receiving and rejecting of evidence. Proof of the acts of the parties toward the legal organization of a company, was properly

received. They were facts in the case. They did not show a full compliance with the statute, nor establish that a corporation was duly formed. But in the view we take of the case, they did show so much done between the parties, as made due and payable within their intent, the money agreed by the defendant to be paid to the plaintiff. The acceptances of the defendant and the two letters from him were properly received. They were acts and admissions pertinent to the issue, and tending to establish the fact of the contract having been made as claimed by the plaintiff. The memorandum, claimed to be a statement of the contract, was properly received. It was proved to have been the result of the negotiations between the plaintiff and the witness, Wm. F. Smith, and testimony was given, tending to show that it had been exhibited to the defendant as such, and that it was accepted by the defendant, as containing the details of the contract between him and the plaintiff.

The defendant offered to prove by the witness, Wm. F. Smith, that when this memorandum was first shown to him, immediately after it was made, he declined to adopt it as his act, or to make any contract on that basis. This testimony the learned referee rejected as immaterial. At the time of this exhibition of the paper to the defendant, he was not one of the negotiators. The bargain was then pending between the plaintiff and the witness, Wm. F. Smith. It was not until after this that the plaintiff and the defendant began to treat. So that any declaration by the defendant to the witness, at the time of the first exhibition of the paper to the defendant, was not material. It was no part of the actings and doings between the parties. It was only an expression of opinion by the defendant to the witness, which certainly did not affect the plaintiff; for it was not shown, nor was it offered to be shown, that this declaration was communicated to or known by the plaintiff.

We do not see that the learned referee, made any error in the other of his rulings, commented on by the respondent;

certainly none which so affects the merits of the case, as to require that we should disturb his judgment.

The judgment of the General Term should be reversed, and that of the referee should be affirmed with costs, to the appellant.

CHURCH, Ch. J., ALLEN, RAPALLO, and ANDREWS, JJ., concur.

Judgment of General Term reversed.

IN RE THE PETITION OF GEORGE DOUGLASS TO VACATE ASSESSMENT, ETC.

The provision of section seven of the charter of the city of New York of 1857 (Session Laws of 1857, chap. 446, § 7), prohibiting the passing of, or adoption of, certain resolutions by the common council, until two days after the publication thereof, in *all* the newspapers employed by the corporation, is mandatory; and an ordinance or resolution, not so published, is void, and an assessment in pursuance thereof invalid.

(Argued May 23d, 1871; decided September 2d, 1871.)

APPEAL from order of the late General Term of the first judicial district, affirming order of the Special Term, denying petition to vacate certain assessments. (Reported below, 58 Barb., 174.)

The resolution authorizing the work, was presented to the board of aldermen July 2d, 1863, and was referred to the committee on roads. August 25th, 1863, the committee on roads reported favorably. September 15th, 1863, the report and resolution were adopted, and directed to be sent to the board of councilmen for concurrence. September 17th, 1863, the resolution was received by the board of councilmen, and referred to the committee on roads of that board. September 21st, 1863, that committee reported favorably. September 24th, 1863, the resolution and report were adopted by the board of councilmen, and directed to be sent to the mayor for approval. The resolution was approved by the mayor, October 3d, 1863.

Statement of case.

The New York Herald, New York Tribune, New York Leader, and New York Dispatch, were the papers employed by the corporation. Neither the original resolution, nor the reports of the committees, of either the board of councilmen or the board of aldermen, were ever published in the Leader or Dispatch. The Herald and the Tribune, published the original resolution and report of the committee of the board of aldermen, only once before it passed the board of aldermen. Each of these papers published a notice of the receipt of the resolution, by the board of councilmen from the board of aldermen, and but one notice of the report of the committee on roads of the board of councilmen.

Between September 15th, 1863, the date of the passage of the resolution and ordinance by the board of aldermen, and the 17th of September, 1863, the date of the receipt of the resolution and ordinance by the councilmen, the ordinance was published in the Tribune and Herald, but not in the Leader and Dispatch.

Charles E. Miller, for appellant. Statutes authorizing assessments must be strictly construed. (*Sharp* v. *Spicer*, 4 Hill, 76; *Sharp* v. *Johnson*, 4 id., 92; *People* v. *Village of Yonkers*, 39 Barb., 266, 271.)

Richard O'Gorman, for the corporation. The statute is directory only. (Sedgwick on S. and C. Law, 370, 371, 378; *Regina* v. *Fordham*, 11 Adolph. & El., 88; *Rex* v. *Inhab. of B.*, 8 B. & C., 29, 35; *King* v. *Inhab. of St. G.*, 2 Ad. & El., 99; *Savage* v. *Walsh*, 26 Ala., 619; *Rex* v. *Justices of L.*, 7 B. & C., 6; *Striker* v. *Kelley*, 7 Hill, 9; *People* v. *Sup. of C.*, 4 Seld., 317; *Merchant* v. *Langworthy*, 6 Hill, 646; 3 Denio, 526; *Pond* v. *Negus*, 3 Mass., 230; *Williams* v. *S. Dist.*, 21 Pick., 75; *Gale* v. *Mead*, 2 Denio, 160; *Thomas* v. *Craft*, 20 Barb., 165; *City of Lowell* v. *Hadley*, 8 Metc., 180; *People* v. *Holley*, 12 Wend., 481; *M. and H. R. R. Co.*, 19 id., 143; *People* v. *Cook*, 14 Barb., 559; 4 Seld., 88, 89, 93; *People* v. *Sup. of Ulster Co.*, 34 N. Y., 268; *Barnes* v.

Badger, 41 Barb., 98.) A statute must not be so construed as to work a public mischief. (*People* v. *Laimbeer*, 5 Denio, 9; 1 Serg. & Rawle, 106; *McKeen* v. *Delaney*, 5 Cranch, 32; *Bank of Utica* v. *Mersereau*, 3 Barb. Ch., 577.)

ANDREWS, J. The seventh section of the act to amend the charter of the city of New York, passed in 1857 (Laws of 1857, chap. 446), after providing for the organization of the two boards of the common council, proceeds as follows:

"All resolutions and reports of committees, which shall recommend any specific improvement involving the appropriation of public money, or the taxing or assessing the citizens of the city, shall be published, immediately after the adjournment of the board, under the authority of the board, in all the newspapers employed by the corporation, and shall not be passed until after notice has been published at least two days."

The manifest design of this provision, was to apprise the tax-payers of the city, in the manner pointed out by the statute, of any contemplated improvement involving expenditure and taxation, before it should be directed by the council, that by remonstrance or suggestion, the proposed action might be prevented or modified.

The prohibition against passing an ordinance involving expenditure, until the required publication should be made, was a limitation upon the power of the common council. There is no room for the suggestion, that this clause of the section was directory. It was plainly mandatory; and a compliance with it was essential to the legal exercise, by the corporate authorities, of the power to authorize and direct local improvements, or to subject the property of citizens to assessment therefor.

Municipal, like private corporations, must act within the limitations prescribed by the sovereign power; and they cannot impose a charge upon the person or property of individuals, unless they proceed in the manner prescribed by law. (*Stetson* v. *Kempton*, 13 Mass., 272; *Sharp* v. *Spier*, 4 Hill, 76; Smith on Statutes, 789.)

The publication referred to in the last clause of the section, is the publication first spoken of, viz., a publication in all the newspapers employed by the corporation. This is the natural construction, and it meets the design of the law, which was not only to provide, that notice should be given by publication, but to define by a uniform rule, the nature and extent of the publication to be made.

If, therefore, the resolution recommending the improvement for regulating and grading Sixty-fourth street, was not published, before it was passed by the respective boards of the common council, in all the newspapers employed at that time by the corporation, the ordinance directing it was void, and the assessment of the plaintiff, on account of it, was unauthorized.

By chapter 227 of the Laws of 1863, the corporate authorities of the city are prohibited from paying, from money raised by tax or assessment, any sum for advertising, except for advertisements in newspapers authorized by the mayor and comptroller, and it is made their duty, to designate not less than four papers in which advertisements may be inserted.

When the proceedings for regulating Sixty-fourth street were taken, there were four papers which had been designated, under the statute, for the purpose therein stated. The designation was general in terms, but, under it, the practice had been, to publish the separate proceedings of each board of the council, in two only of such papers, and the final, completed proceedings of the joint boards, in the others.

The resolution for regulating and grading Sixty-fourth street was published, before its passage, in but two of the designated papers. This was, we think, in plain violation of the statute.

The papers designated by the mayor and comptroller became, by such designation, and by actual employment of them by the council for advertising purposes, official papers of the corporation.

The statute required publication of the resolution referred to, in *all papers employed* by the corporation.

The extent to which these papers, or any of them, should be employed by the council, is, in the absence of any statutory rule, in the discretion of the corporation; but, in respect to notice of proceedings mentioned in the seventh section of the charter of 1857, the statute prescribed what publication shall be made. It was not intended, to leave the matter to the determination of the common council in each particular case.

The council can determine, how many of the papers designated by the mayor and comptroller, shall be employed to do the public advertising; but the statute requires, that in all of these thus employed, resolutions proposing specific improvements involving taxation, shall be published, before final action upon them.

The conclusion is, that the grading of Sixty-fourth street, was passed in violation of law, and that the assessment based upon it was void.

The order of the General Term should be reversed.

CHURCH, Ch. J., ALLEN, FOLGER, and RAPALLO, JJ., concur; GROVER and PECKHAM, JJ., not voting.

Order reversed.

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THE PEOPLE ex rel. THE DUNKIRK and FREDONIA RAILROAD COMPANY, Appellants *v.* JOHN J. CASSITY, EDWARD KEYS and HENRY H. ARNOLD, Assessors of the town of Dunkirk, Respondents.

The term "lands," as used in the statute in relation to assessment and taxation (1 R. S., 360, §§ 1, 2), includes such an interest in real estate as will protect the erections or affixing, and possession of buildings and fixtures thereon, though unaccompanied by the fee; and such an interest, with the buildings and fixtures, may be assessed to the owner thereof.

Railroad corporations are not, in the purview of the tax laws, non-residents of any town, in which they possess lands; such lands are to be assessed against them, the same as against inhabitants of the town, and not as non-resident lands.

(Argued June 16th, 1871; decided September 2d, 1871.)

Statement of case.

APPEAL by the relator from a judgment of the late General Term of the eighth judicial district, affirming the assessment of the respondents as assessors of the town of Dunkirk. The relator is a body corporate, organized under and pursuant to chapter 265, of the Session Laws of 1864, as amended by chapter 34, of the Session Laws of 1866. The relator's organization was completed in the month of December, 1865. By its articles of association, it was authorized to, and did, construct a railroad from a point near the depot of the Erie railway company, in the village of Dunkirk, through various public highways in the towns of Dunkirk and Pomfret, to a point near the Johnson House, in the village of Fredonia. The entire length of the road is three and a half miles less 150 feet, and is wholly within the towns of Dunkirk and Pomfret. The capital stock of the relator is $75,000, divided into 750 shares of $100 each. A little over 300 of these shares have been taken and paid for. The cost of constructing and putting the relator's street railroad in operation was $34,000. The relator's cars are run by horses, and not otherwise.

The relator procured the written consent, of all the persons owning the lands adjoining the public highways, in which its road was built, save one, who owned a strip of land fronting on the highway, about seventy rods.

On the thirty-first day of July, 1869, the respondents, as assessors of the town of Dunkirk, made an assessment *against the relator, by name*, for three and one-half miles of track for the sum of $5,000, and placed the track in the real estate column of their roll as real property. They treated the track, in making the assessment, as real property.

The relator, in due form of law, objected to the assessment so made by the assessors against it. The assessors refused to alter or change it.

The relator thereupon sued out a common-law certiorari, to review such decision.

John Ganson, for appellant, that track of relator's road is not land, within the meaning of the tax laws. (1 R. S., 387, § 2; *People* v. *Board of Assessors*, 39 N. Y., 81, 87; *Band* v. *City of N. Y.*, 2 Sand, 252, 259.) The assessors had no jurisdiction to assess relator as a corporation. (1 R. S., 389, § 6; *Albany and Schenectady Railroad Co.* v. *Osborn*, 12 Barb., 223; *The People* v. *The Board of Assessors*, 39 N. Y., 83.) The assessment should have been, as "non-resident lands." (1 R. S., 389, §§ 1, 2, 3; *New York and Harlem Railroad Co.* v. *Lyon*, 16 Barb., 651, 655; *Whitney* v. *Thomas*, 23 N. Y., 281, 285; *Oswego Starch Factory* v. *Dolloway*, 21 N. Y., 449, 455; *Western Transportation Co.* v. *Sheu*, 19 N. Y., 408; *Camel* v. *The National Protection Insurance Co.*, 10 How., Pr. R., 403; *Hubbard* v. *The same*, 11 How., Pr. R., 149.)

A. J. Parker, for the respondent. The property was properly assessed as lands. (1 R. S., 360, §§ 1, 2; *Hoyle* v. *P. and M. R. R. Co.*, 51 Barb., 45; *Minnesota Co.* v. *St. Paul Co.*, 2 Wallace, 609; 32 N. H., 484; Redfield on Railways, 576; *M. and H. R. R. Co.* v. *Clute*, 4 Paige, 384, 393; *Rood* v. *N. Y. and E. R. R.*, 18 Barb., 80, 85; *Mohawk and Railroad Co.*, 4 Paige, 394; 2 Sanford, S. C., 552; *The People* v. *Board of Assessors, etc.*, 39 N. Y., 87; *Craig* v. *Rochester City R. R. Co.*, 39 N. Y., 404; *Harrison* v. *Parker*, 6 East, 154; *Dyson* v. *Collick*, 5 Barn. & Ald., 600; 4 Kent., 432; *Stukes* v. *Nutt*, 6 Wend., 465; *Sanders* v. *Wilson*, 15 id., 338; *Randall* v. *Crandall*, 6 Hill, 342; 1 John, 145; 6 Wend., 465; 19 Wend., 507; 20 Wend., 96; *People* v. *Erie R. R. Co.*, 52 Barb., 105.)

FOLGER, J. The property assessed in this case, is the track of the relators, consisting of its stringers, ties and rails. This track is laid down in the public highway, and the relators have, or claim, no interest in the land of the highway, save a right to use the same, for the passage of their teams, and vehicles, to and fro over this track. This right they claim, and

doubtless have. And it includes a right to the constant and exclusive, and for the extent of their chartered existence, the lasting use of the soil, for the support of their track. It is an easement. (*Williams* v. *N. Y. Central R. R. Co.*, 16 N. Y., 97–109; *Craig* v. *R. and B. R. R. Co.*, 39 N. Y., 404.) And this is an interest in the land over which it is enjoyed. (Washburn on Easements, 6.) It gives them the right of the exclusive possession, as from time to time they shall need to use any part of it.

By the statutes in relation to assessment and taxation (1 R. S., 360, §§ 1, 2), "all lands * * * within this State, whether owned by individuals or by corporations, shall be liable to taxation * * *." "The term 'land' * * * shall be construed to include the land itself, and all buildings, and all other articles erected upon or affixed to the same * * *; and the terms 'real estate' and 'real property' * * * shall be construed as having the same meaning as the term 'land' thus defined."

By force of these provisions, the track of the relators, consisting of stringers, ties, and rails, affixed to the land; is for the purpose of assessment, and taxation, land, real estate, real property. And it is liable to taxation. To some name, or in some way, it should be assessed. This does not seem to be seriously disputed by the relators. But they suggest, that if the assessors did their duty, which is always to be presumed, then they assessed, to the owners of the fee in the land, over which the highway and the railway run, the land to the center of the highway, and must be presumed to have assessed to them, the land at a valuation affected, and increased by the value of the fixtures, which make the track of the relators. We do not think that such a presumption can be entertained. The facts of the case are too patent and well known, to permit the presumption, that the track was considered as belonging to the owner of the fee, which is little more than a reversion, contingent if at any time in the future, the different rights of way over the land shall cease.

We are not inclined to give to the terms of the statute, a construction so narrow as that required by the position of the relators. That would be to hold, that buildings and fixtures are not included in the term "land," except as inseparable, in the consideration of the ownership thereof, from the ownership of the fee; and that no right or interest in land, less than the fee thereof, would, for the purpose of assessment, be deemed to fall within the meaning of "land," as set forth in the statute. The statute means, for its purpose, to make two general divisions of property; one all lands, another all personal estates; and then, to be more definite, it declares, that by land, is meant the earth itself, and also all buildings and all other articles erected upon or affixed to the same. We do not think that, when buildings or other articles are erected upon or affixed to the earth, they are not, in the view of the statute, land, unless held and owned in connection with the ownership of a fee in the soil. We are of the opinion, that the statute means that such an interest in real estate, as will protect the erection, or affixing thereon, and the possession of buildings and fixtures, will bring those buildings, and fixtures within the term "lands," and hold them to assessment as the lands, of whomsoever has that interest in the real estate, and owns and possesses the buildings and fixtures. The defendants were right then, in considering the track of the relators as land, and liable to assessment as such. (See *The People* v. *Beardsley*, 52 Barb., 105, since, [September, 1869], affirmed in this court.)

Another serious question raised by the relators is, whether the assessors were correct, in the mode of assessment adopted by them. It does not appear upon the papers as clearly as it might, what this mode was. But we think that so much is to be gathered from them, as to show that the track of the relators, was assessed against the company by its corporate name, and as would be the lands of a resident of the town. The return of the defendants to the writ of certiorari says that they "assessed the Dunkirk, and Fredonia Railroad Company for three and one-half miles of track, etc., the sum of $5,000.

and placed the same in the real estate column of their assessment roll as real estate." And this phrase of "assessing against the said company," is several times repeated in the return. And at the conclusion of the return it is stated, that "the only question presented, is whether the assessors were justified, in assessing the Dunkirk and Fredonia Railroad Company, * * * in the manner above stated." It is to be inferred, that the name of the relators was entered upon the assessment roll; and that the assessment of their track was made against them, as if they were residents of the town. That they were residents of the town, and that their track was land of a resident, is denied by them; and it is claimed, that the assessors erred in not assessing it as non-resident lands.

The question then, is, where is the residence of a corporation formed under the general railroad law, for the purpose of the assessment of its real estate? Or is it to be predicated of it, that it has, or that it needs to have, for such purpose, any residence? There is nothing in that law, requiring from it a designation of the town or county, where its operations are to be carried on, as is the case in the general law for the formation of manufacturing companies. (Laws of 1848, chap. 40.) It would, indeed, be impracticable to obey such a requirement, from the very nature of the operations of a railroad company. Hence, the case of *Oswego Starch Factory* v. *Dolloway* (21 N. Y., 449), cited by the relator, is not decisive of the question above stated. For that case turned upon the fact, that as required by law, a principal place of business was named in the plaintiff's certificate of incorporation. And the same, in effect, is to be said as to *Western Transportation Company* v. *Scheu* (19 N. Y., 408). And it is further to be observed, that in those cases, the assessment complained of was upon the personalty of the plaintiffs. In *Conroe* v. *The Nat. Pro. Ins. Co.* (10 How. Pr. Rep., 403), and in *Hubbard* v. *The Same* (11 id., 149), cited by the relator, it was held, for the purposes of determining the place of trial of an action, that the place of general business of a corporation was its place of residence. Though it is to be observed, that the charter

of the defendant in those cases, designated the place for carrying on its business. (11 How. Pr. Rep., 151.) But the inquiry is not touched by this. The law in relation to the assessment and collection of taxes, may be considered as practically a code by itself. The Revised Statutes (vol. 1, p. 414, § 1) enact, that *all moneyed, or stock corporations deriving an income, or profit* from their capital, or otherwise, shall be liable to taxation in the manner thereinafter prescribed. It is then (§ 2) provided that an officer of the corporation, shall yearly deliver to the assessors *of the town, or ward in which such company is liable to be taxed*, a written statement, among other things, of the real estate owned by such corporation, and the towns or wards in which it is situated, and the sums actually paid therefor. It is also provided (id., p. 415, § 6, as amended, Laws, 1853, chap. 654), that the assessors (*i. e.*, the assessors of *such town*) shall *enter the name* of all such incorporated companies upon *their assessment rolls*, with the quantity of real estate owned by them, and the actual value thereof.

These provisions of law are applicable to railroad corporations. The legislature has recognized them as so applying.

By chapter 536 of Laws of 1857, § 6, it declared, that the same should not thereafter apply to such corporations. But the next year (chapter 110, Laws of 1858), this section six, of chapter 536, of Laws of 1857, was repealed, and those provisions of the Revised Statutes, were again applicable to such corporations.

Where then is a railroad corporation "*liable to be taxed*," as provided in section second above referred to? That section refers us to the sixth section of the second title of chapter thirteen of the Revised Statutes (1 R. S., p. 389, § 6), and declares, that they are liable to be taxed according to its provisions.

Making that reference, we find that the real estate of all incorporated companies, liable to taxation, "*shall be assessed in the town or ward in which the same shall lie*," in the same manner as the real estate of individuals. The real estate of individuals, however, is to be assessed as that of a resident or

of a non-resident, as may be the particular condition, in that regard of each individual.

And yet this is not controlling. For though there is this general provision, that the real estate of corporations shall be assessed in the town, or ward in which the same shall lie, in the same manner as the real estate of individuals; we have seen that there is also, the particular provision above referred to (1 R. S., 415, § 6), that the assessors shall enter on their assessment rolls, the name of each incorporated company in their respective towns or wards, liable to taxation on its capital *or otherwise*. The result of these provisions read together, as they must be, is that the real estate of corporations, is to be assessed in the town, or ward in which it lies. This makes the corporation liable to taxation in that town or ward; for, though not liable to taxation on its capital, it is liable "*otherwise.*" Then comes in the specific direction to the assessors (sub., 1, § 6, p. 415, 1 R. S.), to insert in the first column of their assessment rolls, the name of each incorporated company in their respective towns or wards thus liable to taxation; in the second column, the quantity of real estate owned by such company, situated within their town or ward; and in the third column the actual value thereof.

It is evident from these enactments, that these corporations are not in the purview of the tax laws, deemed to be non-residents of any town in which they possess real estate, or to be treated as such.

In general, the real estate owned by them, is to be assessed in the same manner as the real estate of individuals. (1 R. S., p. 389, § 6.) And, in particular, they are to be assessed for their real estate in each town in which it lies, by the entry of their name, the amount of the real estate, and its value upon the assessment rolls, in the same manner as would be done with an inhabitant of the town. (See *Mohawk and Hudson R. R. Co.* v. *Clute*, 4 Paige, 384; and see *Sherwood* v. *S. and W. R. R. Co.*, 15 Barb., 650.)

And the current of legislation has continued in the same course. Thus, by chapter 694, of Laws of 1867, the town

assessors are required, to apportion the valuation of the property of "every railroad company, as appears on their assessment list," among the several school districts in the town; and the amount apportioned to each district, shall be the valuation on which all taxes "against said companies," shall be levied. Thus, by chapter 907 of the Laws of 1869, section 10, it is provided, that no municipal corporation shall aid in building a railroad, which will compete with one already in operation, through that municipality, unless the one already built, shall appear by its name on the assessment roll specified in the act. And the same provision is repeated in a similar act of 1871 (chapter 925, § 10, Laws of 1871).

Thus, by chapter 506, of the Laws of 1870, it is provided, that the clerk of the board of supervisors, (save in New York and Kings) shall deliver to the county clerk, a statement showing the title (*i. e.* the corporate name) of all railroad corporations in the county, as appears on the last assessment rolls, and the valuation of their real, and personal property.

Some of these enactments are subsequent to the origin of the cause of litigation in this case. But they are cited, to show that the legislative understanding has been, that the names of railroad corporations do, as a usual thing, appear upon the assessment rolls of the several towns in which they own real estate; and that so appearing, that real estate must be assessed against them, the same as against inhabitants of the town, and not as the lands of non-residents. And from all this is to be deduced, that so far as the assessment and collection of taxes against the real estate of railroad corporations is concerned, they are not to be deemed residents of any particular place.

And that a railroad corporation is to be treated as *sui-generis* in this matter, is further apparent, from the fact that the general provisions of law, for the assessment of taxes upon real estate will not, with precision, affect its case.

The Revised Statutes volume 1, p. 389, §§ 1, 2, (as amended by chap. 176 of 1851, section 3) provide that: Section 1. "Every person shall be assessed in the town, or ward where he resides

when the assessment is made, for all lands then owned by him, or wholly unoccupied. Section 2. Land occupied by a person other than the owner, may be assessed to the owner or occupant, or as non-resident lands. Section 3. Unoccupied lands, not owned by a person residing in the ward or town where the same are situated, shall be denominated "lands of non-residents," and shall be assessed as hereinafter provided."

The lands of a railroad corporation of any magnitude, will necessarily be found in more than one town, and could not be assessed under the first of these sections, unless it should be held, that the corporation is a resident of each town into which its track runs. Thus to hold, would bring us to the same conclusion which we reach otherwise. They could not be assessed under the second section, because they are not occupied by a person other than the owner, which will scarcely ever be, for the occupation is by the servants and employes of the corporation, and is its occupation, as it can only act through them. They could not be assessed under the third section, for the lands are not unoccupied. Hourly they are in the use, and occupation of the corporation for all its various purposes.

It is claimed however, that the provisions of the 1 R. S. (414, § 2, above cited), apply only to the town in which the principal place of business of the corporation is located, and that the reference in it, to the provisions of section six, (1 R. S., p. 389), is only to those provisions, which direct when the personal estate of a corporation shall be assessed. It is to be borne in mind, that when the Revised Statutes were adopted, there had been "no railway constructed in this State, and only one charter had been granted. It is not surprising, therefore, that no special provisions, in relation to such companies should be found in the tax laws. They must be governed, by the general provisions relative to the taxation of real and personal estates of corporations." (4 Paige, *supra.*)

Now the 1 R. S., 414, § 2, requires, that the officers of the corporation shall furnish a statement to certain assessors. To what assessors? To the assessors of the town, in which the corporation is liable to be taxed, according to the provisions of section six, of article second, of the same chapter. That section provides, that the real estate of all incorporated companies, shall be assessed in the town or ward in which the same shall lie. Those who contend for the construction which we are now criticizing, seem to ignore this provision, and apply the reference of the second section of title four, wholly, and only to the other part of section six of title two, which directs, that all the *personal* estate of an incorporated company, shall be assessed in the town or ward, where the principal office or place of transacting the financial concerns shall be, or where its operations shall be carried on. We cannot admit the propriety of this. One is as much a part of the law as the other. One is equally susceptible of application to the case of a railroad corporation, as the other. There is no torturing of the language, or meaning, or intent of the enactment, in making the one,—as well as the other, applicable; and the town in which the land of a railroad corporation lies, is as much the town in which such corporation is liable to be taxed, as is the town in which is its principal office. In the first only, can its real estate in that town be assessed. In the last only, can its personal property and such land as lies within it be assessed.

It is not necessary to notice the reasoning, from the provisions of the statutes, in relation to the making up of the assessment rolls, by which the conclusion is sought, that the lands of a railroad corporation should be placed thereon among the lands of non-residents. If we have come to a correct conclusion, that in the purview of the assessment laws, a railroad corporation is to be treated, as would be a resident of every town, or ward in which it has real estate, not because it is a resident, but because its lands must be assessed in the town in which they lie, as are those of an inhabitant thereof, then

that reasoning has no place in the discussion. For it's essential is, that the corporation is a non-resident of every place, except that in which it has its principal office.

The judgment of the court below should be affirmed, with costs to the respondents.

All concur.

Judgment affirmed.

46	57
148	683
46	57
150	487
j 150	521
46	57
154	139
46	57
e173	s117
173	s121

THE PEOPLE ex rel. NATHANIEL HILL FOWLER and NATHANIEL H. FOWLER, Appellants, *v.* WILLIAM H. BULL, Respondent.

Where the Constitution of the State directs, that certain officers shall be elected by the people, and authorizes the legislature, to fix the term of office, and the time and manner of election; after the length of term has been prescribed by legislative enactment, and the office filled, an act extending the term of the incumbent is unconstitutional.

Under such constitutional provision, however, the power to direct the times and manner of the election, is a continuing power; and a subsequent statute, fixing a different time for election from the former, is repugnant to and repeals so much of it by implication.

Held, therefore, that section one of chapter 217, Laws of 1866, extending the term of the incumbents, of the office of justice and clerk of the District Court of the eighth judicial district, in the city of New York, is in conflict with section 18 of article 6, of the constitution of 1846, and is void. That section 2 of said act, appointing a different time for the election of said officers, from that prescribed by the act creating the offices (chapter 300, Laws of 1860), repealed so much of the latter act, and an election under it was invalid.

The provision of section 9, article 2, title 6, chapter 5, part 1, of the Revised Statutes (1 R. S., 117), authorizing certain officers to hold over until a successor has duly qualified, applies only to an appointive, not an elective office.

The People v. *Oulton* (28 Cal., 44) disapproved, and *The People* v. *Batcheldor* (2 N. Y., 138) distinguished.

(Argued June 7th, 1871; decided September 5th, 1871)

APPEAL from judgment entered upon decision of late General Term of the first judicial district, denying plaintiff's

application for judgment on verdict, and ordering judgment for defendant.

The action was in the nature of a *quo warranto*, to try the title to the office of justice of the district court in the city of New York, for the eighth judicial district, to which it was claimed the plaintiff was elected on the 4th of December, 1866, for the term of six years, commencing 1st of January, 1867.

The defendant was elected to the office in December, 1860, under the act of April 12 (chap. 300) of 1860; and claimed, that by the act of 24th of March, 1866 (chap. 217), his term of office was extended and continued to and including 31st of December, 1869.

It was proved on the trial, that at the election held in the city of New York, on the 4th of December, 1866, a box was provided and put in charge of the inspectors of the election, in the third district, of the twentieth ward in the city of New York, in the eighth judicial district, which box was marked "Justices, No. 9," and that ballots were received and deposited in it at such election, of which ballot the following is a copy:

"For Justice of the District Court of the Eighth Judicial District,

N. HILL FOWLER,"

and indorsed "Justices, Number Nine;" that such ballots were so given by various parties who were electors in the district, and were received, and deposited in the box by Kenyon Perkins, one of the inspectors of the election, and that no other candidate, except Mr. Fowler, was voted for at such election.

The police commissioners had refused to furnish the box, and it was furnished by Mr. Fowler, he having obtained it for that purpose from Mr. Blunt, one of the supervisors. When the ballots were deposited, this box was sitting alongside the other boxes ranged upon the desk, in charge of Mr. Perkins, one of the inspectors. From fifty to seventy-five votes were given and placed in it. About one o'clock in the afternoon, the police officers came and demanded the box and took it away.

These ballots were not counted, but were destroyed.

The relator had not taken the oath of office.

A. J. Parker, for appellant. That plaintiff's right is not affected because ballots were destroyed and not canvassed. (*Ex parte Heath*, 3 Hill, 42–47; *People* v. *Cook*, 14 Barb., 298, 261; S. C., affirmed, 8 N. Y., 67, 69.) Taking oath of office not a condition precedent. (Code, § 437; *People* v. *Ryder*, 12 N. Y., 435; *Greenleaf* v. *Low*, 4 Denio, 168; *Weeks* v. *Ellis*, 2 Barb., 320.) Election not affected by fact that no notice was given. (*The People ex rel. Davies* v. *Cowles*, 13 N. Y., 350; *The People* v. *Cook*, 14 Barb., 261, 269, 298; S. C., 8 N. Y., 67–69; 6 Hill, 646; 20 Cow., 102; 20 Wend., 12; 5 Denio, 409.)

A. J. Vanderpoel, for respondent. That legislature had power to extend term. (*People* v. *Batchelor*, 22 N. Y., 128; *People* v. *Pinkney*, 32 N. Y., 394; *People* v. *Met. Board of Police*, 19 N. Y., 188.) As to rights at common-law to hold over. (Angel & Ames on Corp., 83; *People* v. *Stratton*, 28 Cal., 382; *People* v. *Oulton*, 28 Cal., 44; *Phillips* v. *Wickham*, 1 Paige, 590; *People* v. *Tieman*, 8 Abb., 359; 30 Barb., 193; *Cordiell* v. *Frizzell*, 1 Nevada, 130; *South Bay Mead. Dam Co.* v. *Gray*, 30 Me., 547; *Foop* v. *Prowse*, 1 Strange, 625; *McCall* v. *The Byram Manufacturing Co.*, 6 Conn., 428; *Cong. Society* v. *Sperry*, 10 Conn., 207; *Spencer* v. *Champion*, 9 Conn., 543; *Pickett* v. *Allen*, 10 Conn., 153.) Law-making power in legislature, save where restricted, or prohibited by Constitution. (15 N. Y., 543; *City of Philadelphia* v. *Fields*, 58 Penn., 324; *People* v. *N. Y. Central R. R. Co.*, 24 N. Y., 487; Dwarris on Statutes, 597.)

FOLGER, J. It is clear, that when the matters occurred with which this case is concerned, the office of justice of the eighth judicial district of New York city, fell within the provision of the Constitution of 1846, contained in the eighteenth section of the sixth article thereof, which is as follows: "All judicial officers of cities and villages, and all such judicial officers as may be created therein by law, shall be elected at such times and in such manner as the legislature may direct."

There was, at that time, but one way of putting any one in that office, except he was placed there to fill a vacancy in it, under some law which the legislature should pass (Const., art. 10, § 5), which was not the case of the defendant. That way was by an election by the people. And that election must have been at such times and in such manner as the legislature might direct. It was as essential that he should be elected at the time, and in the manner directed by the legislature, as that he should be elected. An election at a different time, or in a different manner, was as invalid as a taking of the office otherwise than by election.

The constitutional provision above quoted, recognized the power in the legislature, thereafter to create a judicial officer in the city of New York. And in the exercise of that power, it did, in 1860 (Laws of 1860, chap. 300, p. 519, § 1), create a new judicial district in the city of New York, called the eighth judicial district. It did direct the time for the election of a justice for that district (§ 4), to wit, the then next charter election, which took place in the same year. It did direct the manner in which he should be elected (§ 4), to wit, the same as the justices of the district courts in that city, and that he should hold his office for a term of six years from January 1, 1861.

Under this law, at the charter election in 1860, the defendant was elected to this office by the people. He was elected to it for six years from January 1, 1861. By the constitutional provision, he could have attained the office in no other manner, than by an election to it by the people. By the statutory provision, the people could elect him to it for a term no longer, or shorter than six years from its commencement. When the election was made, it had no other, or further force or validity, than that. For that occasion, the constitutional and statutory power conferred, was fully exercised and spent. To hold the office for any time after the expiration of the term of six years, was to hold it again and anew. And to hold the office again and anew, he must be elected by the people anew, otherwise he would not hold it by an election. And to hold it in any other manner than by an election by the people, was to hold

it in a way that was in disobedience of the Constitution, and was invalid.

After the defendant had taken the office, and just as the term for which he had taken was about to expire, the legislature passed an act (Laws of 1866, chap. 217, p. 471, § 1), extending the term of the office for three years. We think it was not competent for the legislature so to do. It is claimed, that the power in the legislature to fix the length of the term is unlimited, and that, therefore, it may fix and alter and change it at pleasure. It is true that, when the duration of any office is not provided by the Constitution, it may be declared by law. (Const., art. 10, § 3.) It is true that the duration of this office was not provided by the Constitution. But every part of the Constitution is equally obligatory; and a power granted in one provision, must be so exercised as not to clash with a restriction upon power, contained in another provision. And as the term fixed for this office by the legislature, was to be filled by an election to it, the legislature had not the power, by changing the term, to put or keep one in the office otherwise than by an election. The officer must be elected; and the legislature could not, by changing the term after one election, take from the people the right, which they had reserved, to choose who should be the officer. The defendant was elected for six years. For so long, the people made known their will that he should use the office. *Non constat* that they would have willed, that he should use it for nine years. Whether they would or not, the power so to do was reserved to them, and it is an unwarrantable assumption by the legislature, to undertake to exercise it. There is no difficulty in giving simultaneous and according effect, to both of the constitutional provisions above noticed. If the legislature sees proper cause for extending the term of an office, it should at the same time, provide for an election, to fill that extended term. The lengthened duration may be, and should be, so provided for as not to begin, until after the electors have had the opportunity of declaring their will, as to the incumbent for the new term. It is said, that where one has once been

elected to an office, he still remains an elected officer, though the legislature extends the term of his office, and thus continue him in office for a term longer than the electors have chosen him for. And thus, in *Christy* v. *Supervisors of Sacramento County* (39 Cal., 3), it cannot be denied it is said, that he was elected to the office, and that he would not be the incumbent except for his election. But it is to be replied to this, that neither would he be the incumbent, except for the action of the legislature, which is not a constitutional source of title to the office.

And he would look in vain to the election to keep him in office, after the six years of his elective term had passed. It is the act of the legislature alone, or grafted upon the prior election, which does that. And the act of the legislature, whether alone or based upon the election, is an element of authority for the exercise of the office, which the Constitution excludes.

If the legislature can, by extending the term of such an office, continue in it the holder thereof for one year, it may for any number of years; and thus the duration of the term thereof may be perpetuated by legislative power; and the people, after one exercise of the constitutional power of choosing certain of their own officers, be ever after that deprived of it. So the legislature may as well, from time to time, at the expiration of a term, whether the elective term, or the legislative extended term approaches, again and again extend it, and continue in office an incumbent distasteful to his legitimate constituency. Thus would the theory of the government be subverted, and its practice be prevented. The government is the expressed will of a majority of the people, limited by constitutional restrictions. The practice is, that such will shall be expressed, at frequently returning periods. The clause of the Constitution first quoted, for all localities affected by it, embodies that theory. If the legislature may take from the people of a locality, the power at properly returning occasions, of electing certain officers, it effectually draws to itself the power of filling those offices. For there is nothing to prevent its distinguishing in the offices, and

continuing in office, by an extension of term, those whom it favors, and leaving to the chances of a popular election, those for whom it does not care. It is true, that it might at the first directing of an election, or in prospect of a coming election, fix the duration of the term, at such length, as that frequent exercise of the people's will might not be had upon the incumbent. But then, for such lengthy term, the incumbent would be the people's choice, and their choice for it for its whole length. Such course would not operate to fill the office, contrary to the will of the people expressed according to law, or without expression of it. When the Constitution reserves the power to the people of electing an officer, and thus impliedly forbids the legislature to appoint him, it means that he, and the filling of his office, shall be subject to the will of the people, and to it alone. It at the same time gives the legislature power to declare the duration of the office. But doing that, it means no more than that, be the time what it may, and altered in duration when it may, the incumbent shall be the creature of the people. And thus it guards against a majority of the legislature, adverse in sentiment to a majority of the people of a locality, placing or continuing over them in official power, one whom they would not select.

It is not a question of abuse of power. No such power is conferred upon the legislature. The continuance in office by enactment extending the term thereof, of one who has, in the first place, been elected to it, is not properly the exercise of the power to declare the duration of an office. In any proper sense where the office is to be filled by one authority, and the duration of the term thereof is to be determined by another, the declaration of the duration must go before the filling, so that each authority may have its legitimate exercise. And the power to declare the duration is completely exercised, and for the time exhausted, when it announces the duration of the term. When it goes further and declares not only the duration of the term, but who shall fill the office for that term, it has invaded the province of another authority. The legislature may declare, from time to time, and as often as it

sees fit, what shall be the length of the term of this office; but when it designates the one who shall hold the office, it has usurped the power of the people, and its act in that regard is void.

Put this matter to a simple test. The provision of the Constitution was explicit, and was not limited by anything else in that instrument. No one could come to this office but by an election by the people. If the defendant were asked in the fifth, or sixth year of his incumbency, how he held his office, he could truthfully answer, by election by the people. If he were asked in the seventh, eighth, or ninth year, and should make such answer, would it be truthful? The people could elect, but by law for only six years. The six years had gone by. The people had never again elected. The defendant was still using the office. What power sustained him in the use? Could he show any save the statute of 1866, saying (section 1) "the term of office of the justice * * of the district court for the eighth judicial district, in the city of New York, is hereby extended and continued to and including the 31st day of December, 1869, so that the term of office of said justice * * shall expire when the term of office of the present justices * * of the other district courts expire by law." This was his sole show of authority to use the office for those three years.

It will not be claimed, that the legislature could have passed an act, appointing to the office for a term of three years, after the expiration of the defendant's elective term of six years, any person whom it might in the act name. Nor will it be claimed, that it could have passed an act, appointing the defendant to the office by his proper name for that term of three years. That all will concede to be a violation of the Constitution. But is not the violation the same, to continue him in the office by his official name for that time by legislative act? The authority under which he must act for the term is the same in both cases. He would find it not in the voice of the people, but only in the act of the legislature.

The case of the *People* v. *Oulton* (28 Cal, 44) is cited to us to show, that though the defendant might not hold the office by virtue of the act of 1866, he still was lawfully an incumbent of it, as holding over until a successor should be duly elected and qualified. That was the case of a person claiming the office of State librarian, a ministerial office, to which he was, in the first instance, appointed for the term of four years. It is there claimed to be a rule of the common-law that such an officer, at the expiration of his term, may hold over until a successor is duly appointed and has qualified. We are not prepared to assent to the conclusion there arrived at, as one of universal application. The authorities cited to sustain it, do not fully bear it out. It is to be questioned, whether they go further, than that one holding an office, the incumbent of which is, by its tenure, to be annually or periodically appointed or elected, and with no restrictive provision as to the term, may hold over as stated. In *Philips* v. *Wickham* (1 Paige, 594), the chancellor says: "There are, undoubtedly, some common-law officers who are to be elected or appointed periodically, but who, from the necessity of the case, continue to exercise their functions until others are elected or appointed to fill their places. I am not aware," he continues, "of any general principle of the common-law, which authorizes all civil, or corporate officers to hold over after the expiration of the time for which they were elected, until their places are supplied by others." These remarks of his were, to be sure, not upon a point which he considered necessary to be passed upon in the disposition of the case before him. But they induce hesitation in adopting the conclusion arrived at in the case cited to us. The more especially as the court there (28 Cal., 44) expressly declines, to be understood as holding that such a rule extends to judicial officers. (See page 56.) Moreover, in the case at bar, the defendant did not claim to be exercising the office as a hold-over incumbent thereof. He placed his title to it after the expiration of the six years term, explicitly upon the legislative continuance of him in it by the act of 1866. Such is

his answer in the case, and no other right or title is set up. And upon this he must stand.

It is claimed that the case of the *People* v. *Batcheldor* (22 N. Y., 138) makes this question *res adjudicata* in this court. As it would be with much diffidence, that we should differ from the distinguished and accomplished jurist who delivered the opinion in that case, we consider it fortunate that we are not called upon for the purposes of this case to dissent from it. At the same time, however, to prevent misapprehension, it is proper to state, that no inference is to be drawn from anything here said, that the court as at present constituted, would sustain the decision in that case.

In the *People* v. *Batcheldor*, the office in question was one to be filled by appointment. The opinion in it, which prevailed, refers to the provision of law (1 R. S., 117, § 9), that every officer (with some stated exceptions), properly appointed, who shall have duly entered upon the discharge of the duties of his office, shall continue the discharge thereof, although the term of his office shall have expired, until a successor in such office shall be duly qualified. The opinion connects this provision, with the statute which conferred the power of appointment to the office then under consideration, and declares that such power, was to appoint for a prescribed period, and until a successor should be duly appointed and qualified; and that inasmuch as the statute then in question had, in effect, postponed the exercise of that power, so that there could be no appointment of a successor, the incumbent continued to hold indefinitely, by virtue of the provision of the Revised Statutes above given.

"I am prepared, *therefore*," says the distinguished judge, "to hold that the law in question, which, in effect, does no more than this, is not in conflict with the Constitution." The report of the case states, that in so much of the opinion, as relates to the constitutionality of the law extending the term of office, there was a concurrence of enough judges to make a majority of the court.

No provision of the law has been cited, which affects an elective office, as is affected an appointive office by the section of the Revised Statutes above referred to. And as it occurs among sections treating in turn of elective and appointive offices, the legislative intent in it went no further than the latter.

We are, therefore, not constrained by the case in 22 N. Y., to forego the conclusions to which we are led in this case.

And we hold, that the defendant had no right or title to the office of justice of the eighth judicial district court, after the expiration of his term of six years, for the reason that the act of the legislature of 1866, so far as it sought to continue him in office thereafter, was unconstitutional and void.

But it does not follow from this conclusion, that the relator ever acquired a title to the office. If he was not duly elected to the office, he had no title to it. And he could not have been duly elected, unless it was lawful to hold an election in 1866, to choose a person to that office. It was not lawful in that year to hold an election, if the legislature had the power to fix the holding of such election in another year, and to repeal the law for holding it in that year, and if it has so exercised that power as to be operative. The only provisions of law, which we find authorizing the holding of an election to fill that office are as follows: In the act of 1860, (section 4), an election was provided for at the charter election in that year. At that election the defendant was legally chosen; and that passed by. In the fifth section of the act of 1860, it is in general terms provided, that the incumbent of the office, shall be subject to all the legal provisions then existing in relation to the district courts in the city of New York. If this general phrase rendered the office subject to an election, at the time when the offices of the other justices were thus subject, it would not have been on the fourth day of December, 1866, when the relator claims to have been elected. For the time fixed by law for the election of the others was not on that day. (Laws of 1851, chap. 514, p. 957, § 7.) Then comes the act of 1866, which in the second

section fixes the time of the election to this office, at the charter election in the year 1869, and once in every six years thereafter.

As this is the later statute, if it is repugnant in this provision to anything in any former act, the former act is, to that extent, impliedly repealed. A statute, or a part thereof, may be repealed by express words, or by necessary implication. The last effect takes place whenever, by later legislation, it becomes apparent, that the legislature did not intend the former provision to remain in force. If a later statute be repugnant to an older one, so that upon any reasonable construction, they cannot stand together, the first is repealed by implication, though there are no repealing words. It is patent then that the act of 1866, passed the twenty-fourth day of March of that year, having fixed the charter election of 1869 as the time for the election to this office, there could be no lawful election to it in the month of December of 1866, if the legislature had the right to change the time for the election. The Constitution empowers the legislature, in the clause first above quoted, to direct the times and manner of the election. This power is not exhausted by being once exercised. It is a continuing power. And the legislature may, from time to time, as it sees occasion, direct when, and how the election shall take place.

So, as it is not apparent, that the legislature ever directed an election to be held for this office in the year 1866, and as if it did, it afterwards and before the election of that year, changed the time thereof to the year 1869, the form of voting for the relator, on the part of certain of the electors in 1866 was of no avail, their votes went for naught, and the relator was not chosen to the office. (*The Commonwealth* v. *Baxter*, 35 Penn., 263.)

If it be said that the legislature would not have enacted the second section of the act of 1866, directing the time of the election in 1869, if it had not, also, at the same time enacted the first section, continuing and extending the term of office, with a belief that it had power so to do; this may

be. We are not called upon to decide that. Though the first section is void, and is, as if it were not, yet the second section remains. It is not so dependent upon, or connected with the first section, but that it is operative without it.

A portion of a law may be invalid and another portion valid. An invalid portion will not affect another and distinct provision which is valid. (*Duer* v. *Small*, 17 How. Pr. R., 205; *Bank, etc.* v. *Dudley*, 2 Peters, 526.)

The provision in the second section of the act of 1866, is so distinct from and independent of all others, as that it may be read, and is intelligible and may be operative, alone. It was adopted in the exercise of legislative power. We are not at liberty to repeal it by decision, or to suspend its action, because found in the same statute with a provision, the validity of which is questioned, nor because, if enforced alone, it may work inconvenience.

The relator, not having been chosen to the office, is not entitled to a judgment in his favor.

But, as the defendant was an intruder upon the office, the people are entitled to judgment against him to that effect.

It follows that the judgment of the court below, in favor of the defendant, should be reversed, and that judgment should go for the people against him; but, under the circumstances of the case, without costs to either party, as against the other, in this court.

All concur.

Judgment accordingly.

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JAMES T. HALL, Respondent, *v.* WALTER E. LAUDERDALE, Appellant.

An agent, acting within the scope of his authority, and disclosing his agency, will not be personally bound, unless upon clear and explicit evidence of such an intention. The rule is still stronger in the case of a public agent.

An action cannot be maintained against an agent, although, having money of his principal's in his hands, applicable to the payment of the debt of his principal, he refuses to pay it. He is responsible to his principal only for neglect of duty, and owes no legal duty to the creditor.

The provision of section twenty-two of the act of 1864 (chap. 8, Laws of 1864), authorizing the raising of money for paying bounties, etc., being silent as to the means to be used to procure enlistments, it devolved, by necessary inference, upon the board of supervisors to adopt such means, and agencies to accomplish the purposes of the act, as they should deem appropriate. A resolution of such board appointing a recruiting agent, authorized him to appoint sub-agents; his contract for their services bound the county, and he is not personally liable. (GROVER, J., dissenting as to power to bind county.)

Even if the board had no authority to appoint the agent, yet, as its power was determined by the statute, known to both parties, the agent is not personally liable. The agent does not warrant the capacity of the principal to contract.

(Argued June 1st, 1871; decided September 2d, 1871.)

APPEAL from judgment of the late General Term in the seventh judicial district, reversing judgment for plaintiff, entered in Livingston county on the report of a referee. The facts of the case are sufficiently set forth in the opinion.

Scott Lord, for appellant, that the referee erred in refusing to nonsuit plaintiff, *The People* v. *The Board of Supervisors of the County of Livingston* (34 N. Y., 516). Plaintiff was authorized to appoint a sub-agent. (Story on Agency, §§ 73, 201; Paley on Agency, 197, 200; 2 Kent's Com., 617, 618; *Gage* v. *Sherman*, 2 N. Y., 497.) A public agent can never be held personally liable, except under an express promise. (*Walker* v. *Swartout*, 12 Johns., 444; *Oli-*

ver v. *Hicks*, 18 Johns., 122; *Fox* v. *Drake*, 8 Cow., 191; *Belknap* v. *Rinehart*, 2 Wend., 257; *Osman* v. *Kerr*, 12 Wend., 179; *Nichols* v. *Moody*, 22 Barb., 611, 614, 615, 619; *Allen* v. *Barela*, 7 Bosw., 218, 219; *Hodgson* v. *Dexter*, 1 Cranch, 345; 2 Kent's Com., 4th ed., 632; Story on Agency, § 306.)

J. B. Adams, for respondent. That defendant is personally liable. (Dunlap's Paley on Agency, 394; *Murdock* v. *Aiken et al.*, 29 Barb., 59; *Ross* v. *Curtis*, 30 Barb., 238; *Pumpelly* v. *Phelps*, 40 N. Y., 59; Dunlap's Paley on Agency, 380–382; *Taft* v. *Brewster*, 9 Johns., 334; *Barker* v. *Insurance Co.*, 3 Wend., 94; *Pentz* v. *Stanton*, 10 Wend., 277.)

ANDREWS, J. The board of supervisors of Livingston county, acting under the authority, conferred by the twenty-second section, of chapter eight, of the Laws of 1864, provided by resolution for raising money on the credit of the county, to fill the quota of the county, under the call of the president of the United States for volunteers, of July 18, 1864.

The county assumed, in its corporate capacity, to provide the means to raise by voluntary enlistment, the men required to meet the demand of the general government, and thereby avert the necessity of a conscription.

That this was the nature of the proceedings, taken by the board of supervisors, was substantially held by this court in the case of *The People* v. *The Board of Supervisors of Livingston County* (34 N. Y., 516).

The authority given by the twenty-second section of the act of 1864 was, to raise money on the credit of the county, for the use of the county, and "for the purpose of paying bounties to volunteers into the military and naval service of the United States, during the existence of the war, and for the purpose of paying the incidental expenses of such volunteering, etc."

The act is silent, in respect to the means to be used by the supervisors to procure enlistments; and as to the methods by which the ultimate object in view should be secured.

The money, when raised, was to be used for the purposes indicated in the act; and in the absence of any direction in the statute, it devolved by necessary inference, upon the board of supervisors, to adopt such means and constitute such agencies, to accomplish the purposes of the act, as they might deem appropriate.

The resolution of August 3, 1864, passed by the board of supervisors of Livingston county, constituted each supervisor, "recruiting and disbursing agent for his respective town;" and authorized him to draw from the treasury of the county, a sum sufficient to pay the bounties, and expenses fixed by the resolution, in procuring volunteers to fill the assigned quota.

The defendant accepted this agency for the town of Geneseo, of which he was supervisor, and employed the plaintiff to assist in procuring volunteers, to be credited to the town, upon an agreement to pay him the sum of twenty-five dollars for each man, to the number of twenty-five, whose enlistment should be secured by him.

It is claimed by the counsel for the plaintiff, that the defendant was not authorized by the terms of his appointment, to bind the county by the appointment of sub-agents, or by an agreement to pay them for their services.

The compensation which the defendant was to pay the plaintiff, was within the sum which the defendant was authorized, by the resolution of the board of supervisors to pay for expenses.

The referee finds, that the agreement between the parties, was made, while the defendant was engaged in filling the quota of the town, and that "assistance was necessary" in the prosecution of the work.

The resolution appointing the defendant, recruiting agent for the town of Geneseo, does not in terms, authorize the employment of other persons to assist him.

If an authority existed in the defendant for this purpose, it is implied from the authority given him, and from the nature of the business to which the agency related.

The appointment of an agent, in general, carries with it all powers necessary, proper and usual, to effectuate the purposes of the appointment.

The agent may use the ordinary, and appropriate means in execution of the power given to him; and they are deemed to be comprehended within the authority, although not expressed. (Story on Agency, § 97; *Com. Bank* v. *Norton*, 1 Hill, 504.)

We may take notice, as a part of the history of the time, of the circumstances attending enlistment, into the military service during the late war.

In the outset, the ranks of the army were readily recruited, and the tender of services exceeded the demand of the government.

But the extent, and frequency of the calls made, after a time diminished the number of men available for military service; and the protraction of the struggle, and the natural discouragement resulting from frequent reverses, rendered it difficult for the localities to meet the demand for additional men, under the call of July 8, 1864.

The system of bounties; the active competition between counties and towns; the desire to avoid a forced levy of men; the urgency of the general government; all contributed to make necessary the most prompt, and effective measures on the part of the authorities to procure enlistments.

Agents appointed by the State, and by counties and towns, were sent to remote parts of the country, and the use of money, supplemented by active personal effort, was necessary to fill the quota demanded.

In view of the circumstances, and in the absence of restrictive words, we are of opinion that the employment of subagents by the defendant, to assist in the business of recruiting, was within the authority conferred upon him, and a proper and necessary means in executing it.

It cannot reasonably be supposed that the defendant was expected, by personal solicitation and effort, to secure the requisite enlistment, without availing himself of the services and assistance of others.

The conclusion upon this branch of the case is, that it was within the scope of the authority conferred upon the defendant, to bind the county by a contract with the plaintiff for his services in procuring enlistments.

But it is urged by the plaintiff, in support of the judgment, that the contract was the personal contract of the defendant, and that he is personally bound to perform it.

The plaintiff, when the contract was made, had notice of the resolutions of the board of supervisors, and of the official character of the defendant.

The referee finds that the defendant, in making the contract, was acting under the resolution; and the evidence leaves no room to doubt that the plaintiff so understood it.

The defendant had authority to make the contract for his principal; and, upon the facts proved, the law adjudges it to be the contract of the principal.

When the agency is disclosed, and the contract relates to the matter of the agency, and is within the authority conferred, the agent will not be personally bound, unless upon clear and explicit evidence, of an intention to substitute, or to superadd his personal liability for, or to, that of the principal.

In case of written agreements executed by an agent, the agent is, in general, personally bound, if the instrument can have no legal operation against the principal.

But in construing oral agreements made by an agent, courts give effect to the real intention of the parties, unembarrassed by technical rules of construction; and when the act is within the authority, the presumption is, that the agent intends to bind the principal, and not himself. (Story on Ag., 261; 1 Am. Ldg. Ca., 449, note; *Key* v. *Parnham*, 6 Har. & Jo., 418; *Bank of Genesee* v. *Patchin Bank*, 19 N. Y., 312.)

The defendant, moreover, in making the contract, was acting as a public agent; and in such case much stronger evi-

dence is required, to rebut the presumption, that the parties did not contemplate the personal liability of the agent, than when the contract and agency is of a private nature. (2 Kent, 632; *Walker* v. *Swartout*, 12 John., 444; *Olney* v. *Wickes*, 18 John., 122; *Osborne* v. *Kerr*, 12 Wend., 179.)

If it should be conceded, that the action of the board of supervisors in appointing recruiting agents, was not authorized by the law of 1864, as is claimed by the counsel for the plaintiff, it does not follow that the defendant is personally bound by the contract.

It is the general rule that an agent, to avoid personal liability, must contract in such a form as to give a remedy against his principal; and if in making a contract in the name of his principal, he acts without authority, or beyond it, he becomes personally liable. (*Eaton* v. *Bell*, 5 Barn. & Ald., 34; *White* v. *Madison*, 26 N. Y., 117.)

The rule, that the agent is liable when he acts without authority, is founded upon the supposition, that there has been some wrong, or omission on his part, either in misrepresenting, or in affirming, or concealing the authority under which he assumes to act.

The authority possessed by the board of supervisors was derived from the statute; and the boundaries of their power were known as well to the plaintiff as to the defendant.

The defendant had authority, in fact, to make the contract. If the principal is not bound, it is not because the contract is not within the terms of the authority granted, but for the reason that it was *ultra vires*. The agent does not warrant the capacity of the principal to contract.

If he acts within his instructions, and in good faith, especially when the facts are equally known to both parties, he is not personally responsible, although it may happen that the authority itself is void. (2 Kent, 647; Story on Ag., 265; Broom's Leg. Max., 607; *Smout* v. *Ilbery*, 10 Mess. & Wells., 1; *Jefts* v. *York*, 10 Cush., 392; *Walker* v. *Bank of State of New York*, 9 N. Y., 582.)

The remaining ground upon which the liability of the defendant is claimed, is that he had in his hands and under his control, money of the county, applicable to the payment of the demand of the plaintiff, for which an action for money had and received to the plaintiff's use can be maintained.

The relation between the county, and the defendant, created by the resolution of the board of supervisors, and the acceptance by the defendant of the appointment under it, was that of principal and agent.

The defendant was bound to the county for the faithful discharge of the duties of the agency, and to account for all money received by him belonging to the principal.

The act of the agent in making the contract with the plaintiff was, in law, the act of the county; and for any breach of that contract, the county, and not the agent was liable.

If the agent had embezzled, or misapplied the money of the principal, provided for the payment of the plaintiff's demand, the loss must have been borne by the county, and the plaintiff's debt would not have been discharged.

The defendant was responsible to the principal, and to the principal alone, for any omission or neglect of duty in the matter of his agency.

There was no privity of contract between the plaintiff, and the defendant. The latter owed a duty to the county, whose agent he was; but he owed no legal duty to the plaintiff.

The fact that a breach of a contract, is attributable to the violation, by an agent of his duty to his principal, does not give a right of action against the agent, to the party who had a right to demand performance.

The money, received by the defendant, was the money of the principal. It was received by him for disbursement, in the general business of his agency. It was not received under an express or implied contract, to pay out of it the demand of the plaintiff.

It was held by this court, in *Colvin* v. *Holbrook* (2 Comst., 126), that an action would not lie against a deputy sheriff, to recover money, rightfully received by him in that character,

upon process in favor of the plaintiff, although it was demanded of him, while yet in his hands, by the person entitled to receive it from the sheriff. The case is an application of a general principle, governing the relation of principal and agent, and the relations of third persons to them. (*Denny* v. *The Manhattan Co.*, 5 Denio, 639, and cases cited.)

In this case, the statute imposed no duty upon the defendant, as in *Ross* v. *Curtis* (30 Barb., 238). There was no trust impressed upon the fund, when it came to the hands of the defendant, in favor of the plaintiff. The title to the money remained in the county, while it was in the hands of the agent, and it could at any time compel him to account for it.

There is still another decisive reason against maintaining the action, upon the ground suggested. The defendant did account with the county, and the reciprocal claims growing out of the agency, were adjusted and settled between them, before the commencement of this action.

The judgment should be reversed, and a new trial granted.

Agreed to; GROVER, J., dissenting as to power of defendant to bind county.

Judgment reversed.

THE NATIONAL PARK BANK, OF NEW YORK, Respondent, *v.* THE NINTH NATIONAL BANK, OF NEW YORK, Appellant.

THE SAME, Respondent, *v.* THE FOURTH NATIONAL BANK, OF NEW YORK, Appellant.

The drawee of a bill of exchange, is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill in the hands of a *bona fide* holder, to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money. A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, will not be overruled or disregarded.

(Argued April 21st, 1871; decided September 2d, 1871.)

Statement of case.

THE first case is an appeal from judgment of the late General Term, of the first judicial district, reversing order of Special Term sustaining demurrer to complaint, and also judgment entered upon said order.

The last is an appeal from judgment of General Term; New York Common Pleas, affirming judgment of Special Term of that court overruling demurrer to complaint.

The complaint in the first case states in substance, that on the 25th March, 1867, the Ridgely National Bank, of Springfield, Illinois, drew its draft, or bill of exchange, on plaintiff, for the sum of fourteen dollars and twenty cents, payable to the order of Ely Shirly, and delivered the same to the payee. That afterward the amount of said draft was fraudulently changed to $6,300.00, and the name of the payee to E. G. Fanchon, Esq. That the name of Wm. Ridgely, cashier, signed to said draft was erased, and afterward re-written by the person making the erasure. That the same was then discounted by the Lexington National Bank, and by it was endorsed to defendant. That afterward, and on or about April 12th, 1867, defendant presented said draft to plaintiff, and said plaintiff paid thereon the sum of $6,300. That plaintiff discovered the forgery May 10th, 1867, and forthwith notified defendant thereof, and demanded re-payment of said sum, less fourteen dollars and twenty cents, which was refused. Defendant demurs, "that the complaint does not state facts sufficient to constitute a cause of action."

In the last case the facts are similar, save as to amount and names.

J. H. V. Arnold, for appellant, The Ninth National Bank; that drawee is bound to know signature of drawer. (*Jenys* v. *Fowler*, 2 Strange, 931; *Price* v. *Neal*, 3 Burrows, 1354; *Archer* v. *Bank of England*, 2 Douglass, 639; *Smith* v. *Mercer*, 6 Taunton, 76; *Cocks* v. *Masterton*, 9 Barn. & Cress., 902; *Cooper* v. *Myer*, 10 B. & C., 468; *Saunderson* v. *Coleman*, 4 Wing. & Gran., 209; *Smith* v. *Chester*, 1 Tenn., 655; *Barber* v. *Gengill*, 3 Esp., 60; *Boss*

v. *Clure*, 4 Md., 315; *Bank of Com.* v. *Union Bank*, 3 Com., 230; *Goddard* v. *Merchants' Bank*, 4 Com., 149; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287; *Bank of Commonwealth* v. *Grocers' Bank*, 35 How., 412; *Bernhemer* v. *Marshall*, 2 Minn., 78; *Bank St. Albans* v. *F. and M. Bank*, 10 Vermont, 141; *Young* v. *Adams*, 6 Mass., 182; *Gloucester Bank* v. *Salem Bank*, 17 Mass., 41; *Levy* v. *Bank of U. S.*, 4 Dall., 234; *U. S. Bank* v. *Bank of Georgia*, 10 Wheat., 333.)

S. K. Miller, for appellant, The Fourth National Bank, cited the same.

F. C. Barlow, for the respondent. Where parties are equally innocent or negligent, the one paying can recover. (*Markle* v. *Hatfield*, 2 John., 462; *Canal Bank* v. *Bank of Albany*, 1 Hill., 290; *Jones* v. *Ryde*, 5 Taunton, 495; *Merchants' Bank* v. *McIntyre*, 2 Sand., 431; *Ellis* v. *Ohio Life Insurance Co.*, 4 Ohio, N. S., 661.) That payment under mistake can be recovered where holder is not harmed. (*Kelly* v. *Golan*, 9 M. & W., 54; *Townsend* v. *Crowdy*, 8 C. B., N. S., 477; *Utica Bank* v. *Van Geisen*, 18 John., 485; *Kingston* v. *Eltynge*, 4 N. Y., 391.) That this rule applies to a drawee. (Chitty on bills, 12th ed., 431; *McElroy* v. *Southern Bank*, 14 La., 458.)

ALLEN, J. The checks paid by the plaintiffs, the drawees, were forgeries throughout, as well the signatures, as the bodies.

The name of the signer, the cashier of the Ridgley Bank, was not the genuine signature of that officer, and was not written by his authority. The fact that a genuine check had been drawn, and signed by the proper party, upon the same piece of paper, does not affect the character of the instrument in its altered, and forged condition. The forger, by skillfully obliterating the genuine signature, together with the words and figures indicating the amount payable thereon, effectually destroyed the instrument, and it was incapable of being restored to its original condition, in the form of a check, and made available for any purpose.

It was but a blank form of a draft or bill, and the act of signing the name of the cashier as drawer, with intent to utter and pass the same as genuine, was a crime, and the signature a forgery, whether the check was for the same, or a different amount from that for which the original and genuine bill had been drawn.

Whether the forger used the same paper on which the original instrument had been written and signed, and manipulated it to suit his purposes, or made and forged a check on another, and different piece of paper is not material, so long as the signature of the drawer was counterfeit.

The drafts paid by the plaintiff were not merely raised checks, that is, forged and altered by the obliteration and removal of one sum, and the insertion of another, but were forged instruments in every sense.

The drafts signed by the cashier are not in existence in any form as drafts. The genuine signature was wanting, to make the instruments the checks of the nominal drawer, for any amount. The money was then paid by the plaintiff upon bills drawn upon it, to which the name of its correspondent had been forged.

For more than a century it has been held and decided, without question, that it is incumbent upon the drawee of a bill, to be satisfied that the signature of the drawer is genuine, that he is presumed to know the handwriting of his correspondent; and if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the acceptance nor recover the money paid.

The doctrine was broached by Lord RAYMOND in *Jenys* v. *Fawler* (2 Strange., 946), the chief justice strongly inclining to the opinion, that even actual proof of forgery of the name of the drawer, would not excuse the defendants against their acceptance. In 1762 the principle was flatly, and distinctly decided by the Court of King's Bench, in the leading case of *Price* v. *Neal* (3 Burrows, 1354), which was an action to recover money, paid by the drawee to the holder of

a forged bill. Lord Mansfield stopped the counsel for the defendant, saying that it was one of those cases that never could be made plainer by argument; that it was incumbent on the plaintiff, to be satisfied that the bill drawn upon him was the drawer's hand, before he accepted and paid it, but it was not incumbent for the defendant to inquire into it. This case has been followed and the doctrine applied, almost without question or criticism, in an unbroken series of cases, from that time to this, and it has been distinctly approved in very many cases, which have not been within the precise range of the principle decided. (See *Archer* v. *Bank of England*, 2 Doug., 639; *Smith* v. *Mercer*, 6 Taunt., 76; *Wilkinson* v. *Johnson*, 3 B. & C., 428; *Cock* v. *Masterman*, 7 B. & C., 902; *Cooper* v. *Meyer*, 10 B. & C., 468; *Saunderson* v. *Coltman*, 4 M. & G., 209; *Smith* v. *Chester*, 1 D. & E. R., 655; *Bass* v. *Clive*, 4 M. & S., 15; *Bank of Commerce* v. *Union Bank*, 3 Comstock, 230; *Goddard* v. *Merchants' Bank*, 4 Comstock, 149; *Canal Bank* v. *Bank of Albany*, 1 Hill, 287.)

Cases have been distinguished from *Price* v. *Neal*, and its applicability to a transfer of a forged instrument, between persons not parties to it, has not been extended to forgeries of indorsements or handwriting of parties to negotiable instruments, other than the drawer. But, as applied to the case of a bill to which the signature of the drawer is forged, accepted or paid by the drawee, its authority has been uniformly and fully sustained, and the rule extends as well to the case of a bill paid upon presentment, as to one accepted and afterward paid. (*Bank of St. Albans* v. *Farmers' and Mechanics' Bank*, 10 Vermont, 141; *Levy* v. *Bank of the U. S.*, 4 Dallas, 234; *Bank of U. S.* v. *Bank of Georgia*, 10 Wheat., 333; *Young* v. *Adams*, 6 Mass., 182; *Gloucester Bank* v. *Bank of Salem*, 17 Mass., 41.)

A rule so well established, and so firmly rooted and grounded in the jurisprudence of the country, ought not to be overruled or disregarded.

It has become a rule of right and of action among commercial and business men, and any interference with it would

be mischievous. Judge RUGGLES in *Goddard* v. *Merchants' Bank*, *supra*, well says, "it should not be departed from, or frittered away by exceptions resting on slight grounds, and cannot be overruled, without overthrowing valuable, and well settled principles of commercial law." In the first above entitled action, the judgment of the General Term should be reversed, and that of Special Term affirmed, and judgment absolute for the defendant with costs; and in the other, the judgment of the General and Special Term should be reversed, and judgment for the defendant with costs.

All concur.

PECKHAM, J. not voting.

Judgment accordingly.

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124 331
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126 327
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170 515

THE ÆTNA NATIONAL BANK, Respondent, *v.* THE FOURTH NATIONAL BANK OF THE CITY OF NEW YORK, Appellant.

The relation of banker and depositor is that of debtor and creditor. Deposits on *general* account belong to the bank, and are part of its general fund. The bank becomes a debtor to the depositor to the amount thereof, and the debt can only be discharged by payment to the depositor, or pursuant to his order. Until actual payment, or acceptance by the bank of the depositor's check, or an assignment of the credit by the depositor, and notice to the bank, the deposit is subject to his order.

The contract has none of the elements of a trust. For a breach on the part of the bank, of the obligation resulting from the relations between the parties, the depositor alone can sue.

"The Florence Mills," having a balance of $694.88 to its credit with defendant, sent to it, on the 2d April, by mail, a check on another New York bank for $4,895, accompanied by a letter containing this direction: "which (the check inclosed) please credit our account, and charge us our note of $5,000, due the 4th instant." The check was received and credited in account on the 3d, and, on the same day, defendant paid a past due note of $5,000, of "The Florence Mills," payable at defendant's bank, and charged it in account. On the 4th, the note referred to in the letter, held by plaintiff, was presented, and payment refused.

Statement of case.

Held, that the direction contained in the letter did not transfer the fund; that plaintiff acquired no title to it, and could not recover.

Lawrence v. *Fox* (20 N. Y., 268), and like cases, explained and limited.

(Argued June 5th, 1871; decided September 5th, 1871.)

APPEAL from judgment of the late General Term of the first judicial district, affirming judgment entered upon report of referee in favor of plaintiff.

The plaintiff recovered the amount of a promissory note for $5,000, made by "The Florence Mills," a manufacturing corporation, organized under the laws of, and doing business in, the State of Connecticut, dated December 2, 1867, and payable four months after date at the defendant's bank in New York, which had been discounted and was owned by the plaintiff at its maturity, under the following circumstances: The maker of the note kept an account with the defendant, and, on the morning of the 3d of April, 1868, had on deposit to its credit $694.83, and on the 2d of April sent by mail from Rockville, Connecticut, to the defendant, a check on another New York city bank for $4,895, in a letter containing this request: "which (the check inclosed) please credit our account, and charge us our note of $5,000, due the 4th instant." The letter and check were received by the defendant on the morning of the 3d of April, and its receipt acknowledged by the corresponding clerk. The check was collected on the same day, and credited to "The Florence Mills." On the said 3d of April a note of the Florence Mills for $5,000, also payable at the defendant's bank, due the day before, and which had, on that day, been presented for payment and protested for non-payment, was paid by the defendant, and the amount charged to the Florence Mills. On the next day (the 4th April, the last day of grace being on Sunday, the 5th), the note held by the plaintiff was presented at the defendant's bank for payment, and payment refused for want of funds of the maker.

Judgment for the plaintiff, upon the report of a referee, was affirmed by the court at General Term, and the defendant has appealed to this court.

Livingston K. Miller, for appellant. Giving a draft or check, works no appropriation of the funds on deposit. (*Harris* v. *Clark*, 3 N. Y., 93; *Cowperthwaite* v. *Sheffield*, 3 N. Y., 243; *Winter* v. *Drury*, 5 N. Y., 525; *Chapman* v. *White*, 6 N. Y., 412; *Bank of Republic* v. *Williams*, 10 Wall. U. S., 152, and cases cited.) There was no privity of contract. (*Albany Ex. Bank* v. *Sage*, 6 Hill, 562; *Seaman* v. *Whitney*, 24 Wend., 260; *Colvin* v. *Holbrook*, 2 Comst., 126; *Bigelow* v. *Davis*, 16 Barb., 561; *Geer* v. *Martin*, 20 N. Y., 306; *Duffy* v. *Buchanan*, 1 Paige, 453; *Langley* v. *Warner*, 3 Comst., 327.) There was no consideration to support an implied promise. (*Ford* v. *Adams*, 2 Barb., 349; *Blunt* v. *Boyd*, 3 Barb., 209; *Fay* v. *Jones*, 18 Barb., 340; *Hoffman* v. *Schwarbe*, 33 Barb., 194; *Patrick* v. *Metcalfe*, 9 Bosw., 482.)

W. S. Pitkin, for respondent. That there was good consideration for the promise, on the part of the defendant, implied in the receipt and acknowledgment of the letter, to use the money as directed. (*Rutgers* v. *Lucet*, 2 Johns. Cas., 92; Story on Bailments, §§ 171 *a* to 162; *Berly* v. *Taylor*, 5 Hill, 577; *Del. and Hud. Canal Co.* v. *West. Co. Bank*, 4 Denio, 97.) Plaintiff can maintain action in his own name. (*Crocker* v. *Higgins*, 7 Conn., 347; 1 Parsons on Contracts, 5th ed., 467; *Phelps* v. *Conant*, 30 Vt., 277; *Brewer* v. *Dyer*, 7 Cush., 337; *Arnold* v. *Lyman*, 17 Mass., 400; *Hall* v. *Marston*, Mass., 575; *Schermerhorn* v. *Vanderheyden*, 1 Johns., 139; *Farley* v. *Cleveland*, 4 Cow., 432, affirmed in Court of Errors, 9 Cow., 639; *Barker* v. *Bucklin*, 2 Denio, 45; *Del. and Hudson Canal Co.* v. *Westchester Co. Bank*, 4 Denio., 97; *Judson* v. *Gray*, 17 How., 289; *Lawrence* v. *Fox*, 20 N. Y., 268;) The promise may be expressed or implied. (1 Boz. & Pul., 276; *Warren* v. *Batchelder*, 14 N. H., 580; *Lewis* v. *Sawyer*, 44 Me., 332; *Drangham* v. *Bunting*, 9 Ired., 10; *Berry* v. *Mayhew*, 1 Dailey, 56; *Berly* v. *Taylor*, 5 Hill, 577; *Del. and Hud. Canal Co.* v. *West. Co. Bank*, 4 Denio, 97.) The engagement may be regarded as made directly to plaintiff. (See opinions of JOHNSON, Ch. J., and DENIO, J., in *Lawrence* v. *Fox*, 10 N. Y., 268; 1 Parsons on Contracts, 5th ed., 467;

Eagle Bank v. *Smith*, 5 Conn., 71; *Brewer* v. *Dyer*, 7 Cush., 337; *Judson* v. *Gray*, 17 How., 289; *Lawrence* v. *Fox*, 20 N. Y., 268.) Particularly so in cases involving *a trust.* (*Neilson* v. *Blight*, 1 Johns. Cas., 205; *Weston* v. *Barker*, 12 Johns., 276; *Cumberland* v. *Codrington*, 3 Johns. Ch., 251, *Berly* v. *Taylor*, 5 Hill, 577; *Murdock* v. *Aitkin*, 29 Barb., 59; *Ross* v. *Curtis*, 30 Barb., 238; *Lawrence* v. *Fox*, 20 N. Y., 268; see dissenting opinion of Judge COMSTOCK.)

ALLEN, J. The plaintiff does not lay any stress upon the fact, that the money was loaned by it to the Florence Mills, to enable the latter corporation to pay the note which is the subject of this litigation. That transaction has no bearing upon the claim now made against the defendant. The plaintiff was the owner of the note, and but for the premium on the exchange, and the gain of a few days' interest, which resulted from the discount of a new note, and the sale of a bill on New York, to take up the one about to mature, the process of renewal would have been very simple; the exchange of one note for the other, the borrower paying the discount; and there could have been no misappropriation of the funds. Or, the plaintiff might have protected itself against all loss, by remitting, in its own name, the funds for the payment of the note in New York, and in that case, if the defendant had appropriated them to any other purpose, it would have been responsible to the plaintiff. But, by the loan to the Florence Mills, the money became absolutely the property of that corporation, and was at its disposal the same as money received from any other source, and belonging to it. It is not denied that the money was the money of the Florence Mills, and properly deposited with, and received by, the defendant as such, and not as the money of the plaintiff. The Florence Mills had, and kept an ordinary banking account with the defendant, making deposits with, and drawing checks upon the latter as occasion required; and there was nothing in the transactions, or mode of dealing between the parties, to take the account out of the ordinary rules, applicable to bankers' accounts, or

vary the rights, and obligations resulting from the ordinary course of dealing between bankers, and their customers. The relation of banker, and customer in respect to deposits, is that of debtor, and creditor. When deposits are received, they belong to the bank as a part of its general funds, and the banker becomes the debtor to the depositor, and agrees to discharge the indebtedness, by paying the checks of the depositor, his creditor. The contract between the parties is purely legal, and has no element of a trust in it. (*Chapman* v. *White*, 2 Seld., 412; *Marine Bank* v. *Fulton Bank*, 2 Wallace, 252; *Bank of the Republic* v. *Millard*, 10 Wallace, 152.) The money was not sent to, or received by the defendant as the money of the plaintiff, or a specific fund for the payment of the note held by the plaintiff. It was not sufficient for that purpose, but by a credit of the amount to the general account of the Florence Mills, the defendant became a debtor to the depositor, to an amount in excess of that called for by the note. The direction was to credit the account with this sum; and this direction was complied with, and the relation of debtor, and creditor, between the defendant, and the Florence Mills, to the amount appearing upon the books of the bank to the credit of the depositor, was the result. The whole sum was at the disposal of the depositor, and subject to his checks; and the duty of the defendant, as well as its agreement, was to discharge the indebtedness, by paying the checks of the depositor, and the agreement being with the depositor, the responsibility for a breach of it was to the same party, and, in the language of Mr. Justice DAVIS in *Bank of the Republic* v. *Millard* (*supra*), it would be an anomaly in the law, if another party could also have an action for the same thing; and see *Marzetti* v. *Williams* (1 B. & Ad., 415).

It is not claimed, that there was an express promise to or for the benefit of the plaintiff. There was a promise, and agreement with the Florence Mills, of the character, and to the extent indicated, and the law will not imply a promise as a substitute for, or in addition to the express contract of the parties. (*Whitney* v. *Sullivan*, 7 Mass., 107.)

The defendant then, by an agreement with, and direction of, the Florence Mills, became the general debtor of the latter for something more than $5,000; and whether the agreement was to pay checks generally, or to pay them in a particular order, or to pay a specific check for a part of the indebtedness when presented, cannot be very material, as affecting the relations of the parties, or the legal rights of holders of the checks. All contracts of that character are with the depositor, and under such contract it is well settled, no rights accrue to the holders of checks.

Judge GARDNER, in *Chapman* v. *White* (*supra*), says: "The drawee owes no duty to the holder, until the check is presented and accepted." And again: "Money deposited generally with a banker, becomes the property of the depositary. The right of the depositor is a chose in action. It is immaterial, whether the implied engagement upon the part of the banker, is to pay the sum in gross or in parcels, as it shall be required by the depositor." The cases all agree, that notwithstanding the agreement which bankers make with their customers, to pay their checks to the amount standing to their credit, a check-holder can take no benefit from this agreement, and that a check does not operate as a transfer, or assignment of any part of the debt, or create a lien at law or in equity upon the deposit. (*Harris* v. *Clark*, 3 Comstock, 93; *Winter* v. *Drury*, 1 Seld., 525; *Dykers* v. *Leather Man. Bk.*, 11 Paige, 612; *Chapman* v. *White*, *supra*; *Bank of Republic* v. *Millard*, *supra*; *Thornhill* v. *Hall*, 2 Cl. & Fin., 28.)

The principle was applied by this court, in *Cowperthwaite* v. *Sheffield* (3 Coms., 243), to a bill of exchange, drawn against a consignment of goods, of which the consignees and drawees were advised by letter, accompanying a notice of the shipment of the goods. This court held, that the bills and letter of advice did not operate, as an appropriation of the proceeds of the cotton to the payment of the bills. The judge, delivering the opinion, says: "But if it could, by any equitable intendment, be held to amount, to a specific direction to apply the proceeds of the shipment to the payment of these bills, it

could only be in favor of a party, who had notice of the arrangement and who had purchased the bills, or become liable upon them on the faith of it." The plaintiff here has not acted upon the faith of any dealings, or transactions with the defendant. The money deposited to the credit, and going into the general account of the Florence Mills, was only payable upon a proper voucher, upon check, or in payment of an acceptance, or promissory note of the depositor, payable at the bank. An acceptance, or promissory note thus payable is, if the party is in funds, that is, has the amount to his credit, equivalent to a check; and is in effect an order, or draft on the banker, in favor of the holder, for the amount of the note or acceptance. It was so regarded in this case by the parties, and it was, in substance, a check on the defendant in favor of the plaintiff, with a superadded direction by letter from the drawer, to the drawee, to pay it when presented. This direction was a work of supererogation, and gave no additional sanction, or effect to the previous direction embodied in the note. Checks are but inland bills of exchange, and subject to all the rules applicable to instruments of that character, and impose no obligation upon the drawees until accepted, and until presented and paid, are revocable by the drawer, who has the legal control of the moneys to his credit until actual acceptance or payment of the checks, and this upon the principle, that the contract and obligation of the banker, is to and with the depositor, and not the holders of his checks. (See cases, *supra*). An acceptance must be in writing to charge the drawee, and nothing but an unconditional promise in writing to accept a bill before drawn, will be deemed an actual acceptance, even in favor of one who, upon the faith thereof shall have received the bill for a valuable consideration. (1 R. S., 768, §§ 6, 8.)

Before this note matured or was presented for payment, the defendant paid upon another note of the same maker, payable at the bank of the defendant, and which, by commercial usage, takes the place of, and is equivalent to a check, and charged the same to the account of the maker, leaving an

amount to the credit of the account, insufficient to pay the plaintiff. This payment was valid as against the customer of the defendant, the maker of the note, and that corporation has no cause of action against the defendant, either for the money, or for not paying the plaintiff's note when presented. The defendant has performed its contract with the Florence Mills, and discharged its obligation to it, by honoring its drafts, and was without funds for the payment of the plaintiff's note when presented.

If the defendant is charged with the amount of the note at the suit of the plaintiff, the anomaly will be presented, of a liability existing in favor of a stranger to a contract, after it has been fully performed and its obligations fulfilled, in favor of and by transactions with the party with whom it was made. There was no instant of time between the deposit of the money on the third of April, and the presentation of the note by the plaintiff on the following day, that the directions to pay, given by the letter of the second of April, were not revocable by the Florence Mills, and when the money, had it remained to its credit, would not have been subject to its order, and liable to attachment for its debts; and to hold the defendant liable for any reason to the plaintiff, as the result of the deposit with the directions accompanying it, would be to subject it to distinct, and inconsistent liabilities to different persons for the same debt.

It is sought to bring this case within the principle of those, in which a promise to one, for the benefit of another, has been enforced at the suit of the latter. But in all the cases, in which such an action has been sustained, it is believed there has been a promise upon a distinct, independent consideration, connected directly with the promise; and the promise has not been performed in respect to, or discharged by the promisee, but the debt has been still due and undischarged. In the case before us, there was an express contract between the depositor, and the defendant, such as always exists between banks and their customers, and upon which the defendant owed no duty to the plaintiff, and which could be fully performed, and dis-

charged without affecting any legal rights of the plaintiff; and this action can only be sustained, by implying another and a different contract with the plaintiff, touching the general account of the Florence Mills with the defendant, and the debt owing by the defendant to that corporation.

The defendant here has no money, which equitably and in good conscience belongs to the plaintiff. There is no trust fund, or property of which the defendant is the trustee for the plaintiff, as the *cestui que trust.*

The defendant has received no money from the plaintiff, or from any person as from the plaintiff. A new and undefined liability is sought to be established in behalf of a stranger, by implication, from the simple act of a deposit of one sum of money with a banker, accompanied with a direction to pay a larger sum, and debit the same to the depositor, when a particular voucher should be presented, and after the banker has paid the money upon another order, or draft of the customer; making the banker responsible for a proper adjustment of the rights, and equities of different holders of checks, or drafts on the same fund, which was held improper by the chancellor in *Dyke* v. *Leather Manufacturers' Bank* (*supra*). It was not without a struggle that the doctrine, that upon a promise to A, for the benefit of B, the latter could maintain an action, was established, and judges have yielded assent to it with reluctance; and in general, there has been some trust, or the defendant has been charged, as for money which, *ex equo, et bono*, belonged to the plaintiff, and a privity of contract has been spelled out. (See *Mellen* v. *Whipple*, 1 Gray, 317.) The doctrine will not be extended to new or doubtful cases.

When A, being sued by B, paid the debt and costs to his own country attorney, for transmission to B, and the attorney sent a check, exceeding the amount, to his own town agent, directing him to pay the debt and costs out of it, the agent acknowledged the receipt of the letter, and promised to apply the money as directed, but retained it in reduction of a debt due to him from the attorney. It was held, that A could not maintain an action for money had and received against the

agent. (*Cobb* v. *Becker*, 6, Q. B., 930;) *Wedlake* v. *Hurley*, 1 C. and J., 83; and *Williams* v. *Everett*, 14 East, 582, were very similar in their circumstances and in principle to this case. In *Wedlake* v. *Hurley*, A, remitted to B, a bank bill indorsed, "pay to the order of B, under provision for my note in favor of C, payable at the office of B, on the first of January, 1830, for £103.5. 6." The bill was remitted in a letter, containing instructions for the application of the proceeds of the bill, similar to the indorsement. B, collected the bill, and received the money; and upon the application of C, the holder of the note, refused to pay over the money, but kept it, claiming to set it off against a debt due to him from A. C, brought the action, and was nonsuited at the trial before Lord Chief Baron Alexander, and the court in banc sustained the ruling at *nisi prius*, holding that A, might have maintained an action for a misappropriation of the money, but that C had no cause of action. *Williams* v. *Everett* was this: Kelly, residing abroad, remitted bills on England to the defendants, his bankers in London, with directions to pay the amount in certain specified proportions to his creditors, of whom the plaintiff was named as one; and advised the creditors of the remittance, and directions. The defendants collected the bills, and the action was brought for the proportion assigned to the plaintiff, by the debtor remitting the same. The claim made by the plaintiff, was very like that upon which this judgment is sought to be supported, viz.: The assent of the defendants to the terms of the remittance, and an implied promise to comply with the directions, but it was repudiated by the court. Lord ELLENBOROUGH, C. J., says: "By the act of receiving the bill, the defendant agreed to hold it till paid, and its contents, when paid, for the use of the remitter. It is in the power of the remitter, to give and countermand his own directions respecting the bill as often as he pleases; and the persons to whom the bill is remitted, may still hold the bill till received, and its amount when received, for the use of the remitter himself, until by some engagement entered into by themselves, with the person who is the object of the remit-

tance, they have precluded themselves from so doing, and have appropriated the remittance to the use of such person." Those cases cannot be distinguished in principle from this, and they are not in conflict with any of the cases relied upon by the plaintiff. The defendant here has not come under any engagement to the plaintiff, and has not appropriated, or set apart any money, to or for the plaintiff, or done any act precluding it from treating the money remitted by, as well as the money standing to, the credit of the Florence Mills, as the money of that corporation. (See, also, *Baron* v. *Husband*, 4 B. & Ad., 611.) *Lawrence* v. *Fox* (20 N. Y., 268) was upon an express promise, to pay a sum of money received by the defendant, from a debtor of the plaintiff, to the plaintiff; and the promise was the consideration upon which, and upon which alone he received the money. The money was appropriated by the debtor, to the payment of the debt to the plaintiff, and intrusted to the defendant upon an express promise to pay that debt; and yet that case, very different in all the material facts and circumstances from this, was decided by a divided court, and those who acquiesced in the judgment, differing as to the grounds upon which the judgment should rest. Here, the defendant was a debtor of the Florence Mills, upon a general banker's account; there was no special loan on an express promise to pay the plaintiff, and no one else, and there is no principle of agency in the case, which would bring the case within the reasons, which led Judges JOHNSON and DENIO to assent to the judgment in the case last cited. *Kelly* v. *Roberts* (40 N. Y., 432) is, in principle, decisive of this case. It was there held, that an agreement upon no new consideration, between debtor and creditor, that the former should pay the amount of his debt to a third person, is not irrevocable by the creditor, and does not create a trust or interest in such third person, as will prevent its being held under attachment against the property of the debtor. The case is well distinguished by Judge JAMES, in delivering the opinion of the court, from *Lawrence* v. *Fox*, and kindred cases; and in the course of his opinion he says: "The simple inquiry,

whether, if a creditor directs his debtor to pay his note to a third person, and he assents, such creditor can revoke the direction, has never been decided in the negative, and I think it cannot be so decided on any principle." The reasoning of Judge JAMES was concurred in by Judges GROVER, WOODRUFF and MASON. Judge LOTT was also for an affirmance of the judgment, on the ground that the verbal agreement of the defendant, to pay the plaintiff, was made at the same time of the bill of sale of the goods, which was the alleged consideration of the promise, and was therefore merged in it, and void.

There is no principle, or well-considered authority, upon which the judgment can be sustained. I am for a reversal of the judgment, and a new trial.

All concur except CHURCH, Ch. J. dissents.

Judgment accordingly.

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TIMOTHY B. GRANT, Survivor, etc., Respondent, *v.* CHARLES M. SMITH, Appellant.

Defendant guaranteed, that B. & S. should receive and pay for a steam engine and two boilers, of a given capacity and power, particularly described, at an agreed price. By an agreement of the principals, without the assent of the surety, an engine with three boilers, and of a greater capacity and power, at an additional price, was substituted.

Held, that the change in the contract was a material one, imposing entirely new obligations upon the contracting parties, and discharged the surety from any liability.

(Argued June 16th, 1871; decided September 2d, 1871.)

APPEAL from judgment of the late General Term of the seventh judicial district, denying motion for a new trial, and directing judgment to be entered for plaintiff upon verdict. Cause tried in Livingston county.

On the twentieth day of January, 1857, a contract in writing was made and entered into, between L. Sweet & Co., of Dansville, N. Y., of the first part, and B. L. Ball and F. L.

Smith, of Eau Clare, Wis., of the second part, by which Sweet & Co., were to furnish the iron, and machinery for a steam circular saw-mill. The engine of twelve inch bore, and twenty inch stroke, and two cylinder boilers thirty feet long and twenty-four inches in diameter. The price to be paid therefor was $2,000. Upon the said contract was the guaranty of defendant, as follows:

"In consideration of one dollar, the receipt whereof is hereby acknowledged, I hereby guarantee the fulfillment of the foregoing contract on the part of the party of the second part.

"CHAS. M. SMITH, [L. S.]"

"Dated *February 20th*, 1857."

After the execution of the contract and guaranty, it was agreed between the parties to the contract, without the knowledge or assent of defendant, that another boiler should be added, and the necessary changes made in the irons and machinery, and an additional price was agreed to be paid.

Sweet & Co. assigned the demand to Brown & Grant, who brought this action. After the issue was joined Brown died, and the action was continued by Grant as survivor.

The court charged the jury, that the additional boiler and other additional things were ordered, furnished, and charged as extra work, and were not furnished under the contract, and did not operate to alter, or change the contract, to which defendant's counsel excepted.

The defendant's counsel also requested the court to charge the jury that, although Ball & Smith did accept the machinery, if it was not finished in time, or if it was in any way different from what was agreed upon, it did not bind the surety.

The court declined so to charge, and defendant's counsel excepted.

The court directed a verdict in favor of the plaintiff for $3,606.02, to which direction the defendant's counsel duly excepted.

Exceptions were ordered to be heard at first instance at General Term.

Statement of case.

H. R. Selden, for appellant. That the contract of guaranty never became binding on defendant. (Platt on Covenants, 569; Shep. Touch., 164; Chitty on Contr., 8th Am. ed., p. 9 and notes; *Hazard* v. *The N. E. Marine Ins. Co.*, 1 Sumner, 218, 225, 226; Theobald on Prin. and Surety, p. 2.) The alleged receipt of property by defendant as security, does not aid plaintiff. (*Cole* v. *Blunt*, 2 Bosworth, 117–125; *Pope* v. *Dinsmore*, 8 Abb., 429; Code, § 148.) The alteration of the contract without defendant's knowledge released him from liability. (*Bacon* v. *Chesney*, 1 Starkie, 192; *Dobbin* v. *Bradley*, 17 Wend., 424, 425; *Walrath* v. *Thompson*, 6 Hill, 540; *Brickhead* v. *Brown*, 5 Hill, 634; *Smith* v. *Dann*, 1 Hill, 543; *Appleton* v. *Parker*, 15 Gray, 177; *Samwell* v. *Howarth*, 3 Meriv., 272; 2 W. and Tr., leading cases, 715; 2 Am. Leading Cases, 1st ed., 150; *Miller* v. *Stewart*, 9 Wheat., 680; 2 Parsons on Cont., 5th ed., 18, and note (*o*); *Merrimack County Bank* v. *Brown*, 12 N. H., 320; *Fowler* v. *Brooks*, 13 N. H., 240; *Roe* v. *Harrison*, 2 T. R., 425; Chitty on Cont., 529; and the case of *Robinson* v. *Offatt*, cited in note, 7 Munro, 541.)

S. Hubbard, for respondent. That there was no material departure from the contract. (23 How. U. S. R., 149; 37 N. Y. R., 526; *Hosley* v. *Black*, 28 N. Y. R., 444; *Sinclair* v. *Talmage*, 35 Barb., 602.) The testimony being conclusive, it was the duty of the court to charge in accordance therewith. (*Mason* v. *Lord*, 40 N. Y. R., 477, 484; *Dickerson* v. *Wasson*, 48 Barb., 412; 2 Comstock's R., 383; *People* v. *Cook*, 4 Selden R., 67, 74–78.) If defendant did not concede the facts, he should have requested the court to submit to the jury whatever he disputed. (*Sand* v. *Shoemaker*, 2 Keyes R., 268; *Seymour* v. *Cowing*, 1 Keyes R., 532; *Stedman* v. *W. T. Co.*, 48 Barb., 97; *Downs* v. *Bush*, 28 Barb., 157, 180; *People* v. *Cook*, 4 Seld. R., 67, 78; *Winchell* v. *Hicks*, 18 N. Y. R., 558; *Barnes* v. *Prime*, 2 Kernan, 23.) The guaranty must be construed most strongly against the guarantor. (19 Eng. Com. Law R., 70; Tindall, Park &

Burrough, J.; 2 Parsons on Contract, 21, note U, 1st ed.; 2 Parsons on Contract, 5th ed., 509, note X; *Rochester City Bank* v. *Elwood*, 21 N. Y. R., 88, 90; *Benjamin* v. *Hillard*, 23 How. U. S. R., 164; 17 Wend. R., 425, top of page; 4 Barb., 487–489; 4 Hill, 202, top of page; 37 N. Y. R., 526; *Lee* v. *Dick*, 10 Peter, 482; 3 Eng. Com. Law R., 474; 34 Barb. R., 208; 43 Barb. R., 217; 9 Cush., 131; 23 How. U. S. R., 149; *Hosley* v. *Black*, 28 N. Y. R., 444; *Sinclair* v. *Talmage*, 35 Barb., 602.) It was correct to direct a verdict. (37 N. Y. R., 526; 32 N. Y. R., 405, 427; 19 Abbott R., 325.)

ALLEN, J. Had the objection been distinctly taken upon the trial, that the contract of guaranty, never took effect as a binding obligation upon the defendant, it would have presented a serious question, going to the foundation of the action.

But, as this point was not taken as distinctly as it might have been at the trial, and it is claimed by the plaintiff, was not so taken, as to be made available upon this appeal; and as, in the view taken of other questions which were pointedly raised, it is not necessary to pass upon it, we refrain from deciding it. The judge at circuit charged, as matter of law, in substance, that the contract was not, by agreement of the principal contracting parties, altered or changed. It is conceded that any material variation or change, by the principals, in the terms of the contract, without the assent of the surety, operates to release the latter from his obligations. Whatever was done in this respect, in the case before us, was done without the knowledge of the defendant, or any assent on his part; and the question is, whether the contract was varied in its terms, by the act and agreement of the parties to it.

If another contract has been substituted for the original contract, or an alteration made in a point so material as, in effect, to make a new contract, without the consent of the surety or guarantor, he is discharged. He may say, "*In hoc fœdere non veni;*" and to charge him, the case must be brought strictly within the terms of the guaranty, when rea-

sonably interpreted. (*Bacon* v. *Chesney*, 1 Starkie, 152; *Dobbin* v. *Bradley*, 17 Wend., 422; *Walrath* v. *Thompson*, 6 Hill, 540, affirmed, 2 Comst., 185.)

But, passing the question, suggested by the cases cited, whether the plaintiff can recover against the surety, upon proof of performance, varying essentially from that called for by the original agreement, although assented to by the principal, the question recurs, whether there was a substantial variation of the contract guaranteed, upon the assumption, that the guaranty became valid and obligatory, as a security for the payment of an engine and machinery, of the character and description mentioned in the contract, to be delivered within a reasonable time after the 17th of March, 1857.

Judge STORY, in *Miller* v. *Stewart* (9 Wheat., 680), enunciates the principle, by which the obligations of sureties are controlled, very distinctly, and in accordance with the whole current of authority. He says: "Nothing can be clearer, both upon principle and authority, than the doctrine, that the liability of a surety is not to be extended by implication, beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no farther. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal." And see *Gahn* v. *Niemcewicz's Executors* (11 Wend., 312).

By the contract of the defendant, he guaranteed that Ball & Smith should receive, and pay $2,000, at the times and in the manner specified, for "a steam engine of twelve inch bore, and twenty inch stroke; *two cylinder boilers*, each thirty feet long and twenty-five inches in diameter; and all the shafts, pulleys, and iron necessary," etc. The thing to be furnished, the subject-matter of the contract, was an engine and two boilers of a given capacity and power, particularly described, at an agreed price. By agreement of the parties, without the assent of the surety, an engine with three boilers, and of

a greater capacity and power, was substituted, and an additional price agreed to be paid. The change in the contract, imposed entirely new obligations upon each of the contracting parties. Proof of performance of the original contract, would not have authorized a recovery upon the new; and so proof of a performance of the last contract, would not have entitled Smith & Co. to recover upon the original. The two together constituted a new or substituted contract, obligatory upon the parties to it, but for the performance of which by Ball, & Smith, the defendant has not undertaken. He guaranteed the payment of $2,000, the agreed price of property particularly described, but did not guarantee the payment of that sum, as a part of the purchase-price of an essentially different article.

The defendant may be presumed to have known the circumstances of his principals, their ability to pay, the capacity of their property, and the power of an engine which could be profitably employed; and to have been willing to aid them in procuring an engine of the requisite power, and to undertake for them to a limited amount, understanding that their engagement was for such an engine, and only to the same amount, for that object. It is evident that the risk, and responsibility of the defendant, was materially changed by this new contract for the additional boiler, and the incidental necessary changes in the machinery and connections.

The change in the character of the work was neither trifling, nor immaterial. A delivery of an engine with three boilers, grates, smoke-stacks, pumps, water and steam pipes, is not a substantial performance of a contract for a like engine, with two boilers, with corresponding attachments. A change so essential, and material in the principal thing, the subject-matter of the contract, is not mere extra work, something additional to the main thing. It is a change in the thing itself. It would seriously impair the rule, so well established for the protection of sureties, prohibiting all dealing with the principal to his prejudice, and declaring all substantial variations in the contract without his assent, to operate as a discharge of his obligations, to regard a change, by which a different article

from that originally agreed upon is substituted, and at a different price, to be but an acquiescence in an immaterial departure from the contract, and as not affecting the liability of the surety, and would give a dangerous latitude to the principals, in their dealings as to the subject-matter of the contract, and greatly enhance the risk of sureties. In *Benjamin* v. *Hillard* (23 How. U. S., 149), there was a simple acquiescence in the prolongation of time for the fulfillment of the contract, and the machinery substantially conformed to the contract. The defects were latent, and were remedied as soon as discovered. It was simply held, that mutual accommodation between the parties, without any legal constraint, would not relieve the surety. The principle that any essential variation of the contract would discharge the surety, is clearly stated by Judge CAMPBELL, in giving the judgment; and he cites *Gahn* v. *Niemcewicz* in affirmance of the doctrine. *Boinese* v. *Wood* (37 N. Y., 526) was decided upon the ground, that the surety had made his liability to depend upon the acts of the principal, and was, therefore, bound by the appointment of an arbitrator, as an act expressly provided for by the agreement, and does not touch this case; but the principle contended for here is expressly recognized, as well in the prevailing as in the dissenting opinion. The ruling of the judge at the circuit upon this question, was clear and distinct, and left no question for the jury, as to any supposed waiver by the defendant of his rights, or assent by him to the variation in the terms of the contract.

The judgment should be reversed, and a new trial granted; costs to abide event.

All concur.

Judgment accordingly.

46 100
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IN THE MATTER OF THE PETITIONS OF LAURA E. EAGER et al., TO VACATE ASSESSMENTS, ETC.

A resolution of the common council, of the city of New York, directed that certain streets be paved with Nicolson pavement, and "that cross-walks be laid or relaid at intersecting streets, under the directions of the Croton aqueduct department."—*Held*, that said resolution did not require a cross-walk at every street intersection; but that the department could omit such as it deemed unnecessary or improper.

Under the provisions of section 38 of the charter of 1857, where an improvement is directed, embracing several kinds of work, which may be performed separately and by different parties, some of which are patented and others not, separate proposals should be invited for that part which is not patented, and for which there can be competition. An advertisement inviting proposals for the work united is defective, and the assessment founded thereon irregular.

It is not error to graduate the contract price for the work, according to the time employed in doing it.

Neither is it error to include in the assessment, the whole amount of the commission to be paid the collector.

An error of judgment upon the part of the commissioners apportioning the sum assessed, cannot be reviewed in proceedings instituted under chapter 388, of the Laws of 1858; that can only be resorted to for the purpose of reviewing frauds or irregularities.

The provision of section 27, chapter 383, of the Laws of 1870, authorizing a deduction from an assessment of the sum erroneously included, is not retroactive, and does not affect proceedings had before the passage of the act.

(Argued June 13th, 1871; decided September 2d, 1871.)

APPEALS by the mayor, etc., of the city of New York, from orders of the late General Term of the first judicial district, affirming orders of Special Term vacating certain assessments, imposed on the property of the petitioners, for paving Irving place, Nineteenth street, and Sixteenth street with Nicolson pavement. (Reported below 58 Barb., 557.)

On the 29th of June, 1868, the following resolution was passed by the common council over the mayor's veto:

"*Resolved*, That Nineteenth street, from Third to Sixth avenue, be paved with Nicolson pavement, and that cross-

walks be laid or relaid at intersecting streets, under the direction of the Croton aqueduct department; and that the accompanying ordinance be adopted."

That ordinance provided, that the work should be done by assessment; proposals were issued for the work under advertisements, which advertisements invited proposals and bids for contracts for Nicolson pavement only.

The only bid received, was from the Nicolson Pavement Company; and a contract was executed between it and the mayor, aldermen and commonalty, in March, 1869.

In June, 1869, the Croton aqueduct board certified to the bureau of assessors, that the contract had been performed and accepted by the board, and the prices and quantities of work; and the assessors proceeded to estimate the expense of the work upon the property benefited thereby.

In the contract, an allowance was made for each day the work was completed within the contract time. The amount of this allowance was included in the assessment.

Two and one-half per cent, collector's commission upon the whole amount to be collected, was also included.

The assessment was confirmed on the 1st of September, 1869. The proceedings were instituted in February, 1870. On the twenty-third of February, an order of reference to take proof was made. The cases were argued before BRADY, J., on the 20th of April, 1870.

Richard O'Gorman and *A. J. Vanderpoel*, for appellant. That defects in the proceedings, not objected to in the petition, cannot be considered. (*Horn's case*, 12 Abb., 124; *Rich's case*, id., 118; *Matter of Keyser*, 10 id., 481; *Miller's case*, 12 id., 121; 1 Hoffman's Laws, 240.) It was no objection, that the Nicolson pavement was a patented article, and excluded competition. (*Astor* v. *The Mayor*, MS.; *Miller's case*, 12 Abb., 121; *Rich's case*, id., 118; *Matter of Babcock*, 23 How., 118; *Horn's case*, 12 Abb., 124; *Bennett's case*, id., 127; *Hay's case*, 14 id., 53; *Lewis* v. *Mayor*, 51 Barb., 82.) The act of 1870 applies to these proceedings. (*Curtis* v.

Leavitt, 15 N. Y., 9, 13, 85, 254; *In the Matter of Palmer*, 40 id., 561; *Litch* v. *Brotherson*, 16 Abb., 384; *Butler* v. *Palmer*, 1 Hill, 331; *Church* v. *Rhodes*, 6 How. Pr., 281; *In the Matter of Beams*, 17 How., 459.)

A. R. Lawrence, Jr., for respondents. That the statutes should be strictly construed. (*Sharp* v. *Speir*, 4 Hill, 76; *Sharp* v. *Johnson*, 4 id., 92; *In re Blodgett*, MS. opinion, GROVER, J.; *Matter of Mott*, MS.) The department had no authority, to deviate from the resolution of the common council, and omit the cross-walks. (*Matter of Wood*, 54 Barb., 276; see *Smith* v. *City of New York*, 10 N. Y., 508; id., 4 Sandf., 222.) The assessments should have been confirmed by the common council. (2 Revised Laws, 1813, p. 407; Davies' Laws, etc., 526.) So much of chapter 308, Laws of 1861, as attempts to deprive the common council of this jurisdiction, is in conflict with section 16, article 3, of the State Constitution. (*People* v. *Hills*, 35 N. Y., 449; *People* v. *O'Brien*, 38 id., 193; *People* v. *Com. Highways*, 53 Barb., 170; *People* v. *Allen*, 42 N. Y., 419; *Gaskin* v. *Meek*, 42 id., 188; *Gaskin* v. *Anderson*, 55 Barb., 419; *People* v. *Bradley*, MS., decided at October Term, 1869.) The act passed April 26, 1870, does not apply to this case. (Laws of 1870, vol. 1, p. 881; *Dash* v. *Van Kleeck*, 7 Johns., 477, and cases *infra*; *Johnson* v. *Burrell*, 2 Hill, 238, per COWEN, J.; see also, particularly, *Ely* v. *Holton*, 15 N. Y., 595; *Calkins* v. *Calkins*, 3 Barb., 306; *Wood* v. *Oakley*, 11 Paige, 400; *McManus* v. *Butler*, 49 Barb., 177; *People* v. *Hills*, 35 N. Y., 449; *People* v. *O'Brien*, 38 id., 193; *People* v. *Com. Highways*, 53 Barb., 70; and see *People* v. *Allen*, 42 N. Y., 419; *Gaskin* v. *Anderson*, 55 Barb., 259; *Gaskin* v. *Meek*, 42 N. Y., 188; *Bailey* v. *Mayor, etc.*, 7 Hill, 146.)

RAPALLO, J. These proceedings were instituted in the Supreme Court, under the act of 1858 (Laws of 1858, p. 574), for the purpose of vacating assessments upon the property of the respective petitioners, for paving parts of Irving place, Nineteenth street, and Sixteenth with Nicolson pavement.

The resolutions of the common council, under which the several improvements in question were made, were all in the same form and directed, that the streets therein mentioned, "be paved with Nicolson pavement, where not already paved with Belgian pavement, and that crosswalks be laid or re-laid at intersecting streets, under the direction of the Croton aqueduct department, and that an ordinance which followed each of the resolutions be adopted."

The ordinance provided, that the work be done by assessment.

It appears from the proof taken by the petitioners, and upon which the hearing was had at Special Term, that in performing the work directed by these resolutions, stone cross-walks were not laid at all the intersecting streets, embraced within the several areas directed to be paved, but only at those places where the intersecting streets were paved with Belgian or concrete pavement. For instance, Irving place, from Fourteenth to Twentieth streets, is intersected by five streets. Three of these were paved with Belgian or concrete; but at Sixteenth street and Nineteenth street, which were directed to be paved with Nicolson pavement, there were no cross-walks laid, but the Nicolson pavement was continued over the space where there had previously been cross-walks.

It was proved, on the part of the city, without contradiction, that it was injurious to the Nicolson pavement, to interrupt it at intervals by cross-walks of stone; and that the contractor was directed, to lay cross-walks parallel to the work, and transversely, at the commencement and termination of the work, but at no other places.

The petitioners claim, that under the resolution of the common council, cross-walks should have been laid at all the intersecting streets; and that so much of the Nicolson pavement, as covers the spaces where the cross-walks should have been laid was unauthorized, and that the cost of such pavement being embraced in the assessment, vitiates the whole assessment. The first three specifications of alleged irregularities

set forth in the petition, consist of this objection stated in different forms.

The court below seem to have supposed, that the objection was, that the expense of the cross-walks was included in the assessment, though none were laid, and the case was disposed of at General Term on that ground. But such was not the objection, nor was there any allegation or proof that any cross-walks were charged for, which were not laid. The objection made by the petitioners, was to the charge for Nicolson pavement, in those places where it was claimed that there should have been cross-walks.

We do not think, that the terms of the resolution of the common council are so specific in this respect, as to require that cross-walks should be laid at every intersection, whether needed or not. The evidence shows that such cross-walks were rather injurious than beneficial, at those points where the intersecting streets were laid with the Nicolson pavement, and that their cost was nearly three times as much per superficial yard as that of the pavement. Clearly, the petitioners have not been aggrieved or injured by the omission; and unless the language of the resolutions is so clear as not to admit of any other construction, we ought not to hold, that the city was bound to incur this useless additional expense.

The language of the resolutions is, that the street be paved, etc., and cross-walks laid or relaid at intersecting streets, under the direction of the Croton aqueduct department. The resolutions do not say, in terms, that they shall be laid at all the intersections; and in view of the character of the pavement, as shown by the evidence, we think that the resolutions were substantially complied with, by laying cross-walks at those intersections at which, in the judgment of the department, they were necessary or proper. There is no proof that this was not done; and we think, therefore, that the objection, presented by the first three specifications, is untenable.

It is further objected, however, that although cross-walks, as well as pavement, were required by the resolutions, and some were contracted for and laid, and new bridge-stones

furnished and charged for, to amounts exceeding $250 in each case, there was no advertisement for sealed proposals for such cross-walks or bridge-stones, as required by section 38 of the charter of 1857. This objection is presented by the fifth and sixth specifications of the petitions.

The advertisement published, and read in evidence, called for sealed proposals for the construction of Nicolson pavements, in the localities described in the resolutions, and stated that the plans for the works might be seen, and specifications and forms for the bids obtained, on application at the office of the Croton aqueduct board.

The advertisement did not mention cross-walks or bridge-stones, and it is urged that it did not give notice, that such bridge-stones or cross-walks were required; that although they were mentioned in the specifications, in the office of the Croton board, to which attention was invited, yet that there was nothing in the advertisement, to indicate that cross-walks would be embraced in the specifications, or to induce parties to examine them, with the view of bidding for such cross-walks. It might, perhaps, be an answer to this objection, that contractors, acquainted with the business of laying pavements, would know that cross-walks at some points would be a necessary part of the work, and, therefore, that the advertisement for pavement embraced cross-walks, as incidental thereto.

But in this case there is an element which presents a more serious difficulty. It appears that the Nicolson pavement is a patented article, which could be furnished by only one party, and that there was necessarily but one bidder for the contract. The objection taken in the respondent's points, that inasmuch as there can be no competition in such patented articles, the city has no right, under the charter, to contract for them, is not taken in these petitions, and is not properly before us; but the objections which are taken in the petitions, to the want of a sufficient advertisement, for proposals for the cross-walks or bridge stones, ordered by the resolutions, does raise the question whether, where an improve-

ment is ordered by the common council, which embraces several kinds of work, capable of being separately performed by different parties, some of which works are patented and others not patented, separate proposals should not be invited for that part of the work which is not patented, and for which there can be competition.

It seems to us, that the intent of the thirty-eighth section of the charter, cannot be carried into effect without such a separation. Even if we should hold that patented articles may be contracted for by the city, notwithstanding the impossibility of competition, we ought to stop there, and not go to the length of sanctioning a practice, whereby competition may be prevented, by unnecessarily coupling a work not patented, with one which is patented, and advertising for an entire proposal for the whole.

In the former case there is no alternative, between incurring the hazard of abuses, which may result from the absence of competition, and absolutely depriving the public of the benefit of useful improvements and inventions; but in the latter case competition is unnecessarily excluded, as to a portion of the work, and as to that portion, the spirit of the thirty-eighth section completely evaded. We are, therefore, of the opinion, that a fair and substantial compliance with that section requires, that where the work is separable, separate proposals should be invited by advertisement, for that portion which is not the subject of a patent, so that persons other than those controlling the patent may be bidders.

In this respect, the advertisement in the present case was defective. Even if the term pavement be sufficient to embrace the appropriate cross-walks, yet the advertisement did not authorize, any separate proposals for the cross-walks, and no persons but those who had it in their power to propose for the pavement, could be bidders for the cross-walks. By this mode of advertisement, patentees of the pavement, were secured against competition for the cross-walks or bridge stones, as well as for the patented pavement, and were enabled, had they chosen to do so, to charge any price, however

exorbitant, for articles which, under a different mode of advertisement, would have been open to competition. It does not appear, that in this case the contractors availed themselves of the opportunity thus afforded, of taking an undue advantage; but a system which would open to unscrupulous parties such an avenue to fraud, should not be sanctioned, and is diametrically opposed to the spirit of the thirty-eighth section of the charter.

Our conclusion is, that there was no regular or sufficient advertisement, for proposals for the cross-walks and bridge stones, and that this irregularity invalidated the assessment.

The fourth specification of the petitions, relates to a per diem allowance made to the contractors, pursuant to one of the provisions of the contract, for completing the work in a shorter time than that limited by the contract.

The 38th section of the charter of 1857 provides, that when proposals are advertised for, the terms of the contract shall be settled by the corporation counsel, as an act of preliminary specification to the bid or proposal. Contracts containing specifications, were prepared in accordance with that provision; and an examination of them, invited by the advertisement, as has already been shown. The bids were therefore made with reference to this provision of the contract; and it was proved, upon the hearing, that such is the usual practice. That the time for completion of the work, is an essential part of the bids; that when bids are equal in other respects, the party offering to do the work within the shortest time, is treated as the lowest bidder. The daily allowance under each contract for time saved, is precisely equal to the daily expense of inspecting the work; and the same sum which the city pays to the contractor for shortening the time, it saves in inspectors' fees.

By another stipulation of the same contract, if the prescribed time is exceeded by the contractor, he is bound to pay the inspectors' wages during the excessive time. The time, therefore, within which the work is to be completed, affects its price, and within the bounds fixed by this contract, I can

see no objection, in ordinary cases, to graduating the price to be paid, according to the time allowed for performing the work. This provision for an allowance, it is true, might in the case of a patented article, be used as an instrument of fraud, but that result flows from the inherent difficulties, of applying the competitive system to such cases, and not from the method of adjusting the price. The danger lies in the impossibility of competition, and not in the form of the contract. If we hold that the city may contract for such articles, I do not see that any additional hazard is incurred, by allowing the price to be graduated according to time, as in other cases. It is just as easy for bidders, disposed to take undue advantage, to add to the price demanded, as to the number of days required for performance.

The seventh specification relates, to the charge of commissions, at the rate of two and a half per cent upon the whole amount, payable into the bureau of assessments. This results, in a charge of two and a half per cent, upon the amount expended upon the work, and also of two and a half per cent, upon the commission chargeable upon that sum, and at first sight the charge would seem to be excessive. But on an examination of the statute, I am inclined to the opinion, that it is justified. The act contemplates that where work is done by assessment, the whole expense shall be borne by the property owner, and no part of it by the city. To accomplish this result, the whole of the commission payable to collectors, should be included in the assessment. The commission allowed by the statute for collection, is two and a half per cent, on all items of assessments collected by the bureau. The collectors are not allowed by the statute (see 1 Hoffman's Laws, 240), to retain their commissions and pay the balance into the bureau, but must pay into the bureau the whole amount collected; and on the amounts so paid in, commissions are to be computed and paid monthly, by the comptroller on the requisition of the street commissioner. Under this system, if the two and a half per cent were computed only on the cost of the work, the city would inevitably be the

loser to some extent, for instance: A piece of work costs $4,000; a commission of two and a half per cent added to this, would make the whole amount to be assessed $4,100. The collector collects and pays into the bureau the $4,100. He is then entitled by law, to draw out two and a half per cent on the $4,100 paid in; which commission would be not $100, but $102.50. The $2.50 would thus be lost by the city. This result can only be avoided, by the system which was pursued in these cases, of including in the assessment the whole amount of commissions, which the collectors would be authorized to draw.

The eighth and last specification is, that the principle upon which the assessment was apportioned is erroneous, it not being imposed on the several lots, in proportion to the advantage which each derived from the pavement, but in proportion to the frontage.

We do not think, that this is a subject which could be inquired into, in this form of proceeding. If an error has been committed, in not making an equitable apportionment of the sum assessed among the several property owners, it is an error of judgment on the part of the commissioners, and not a fraud or irregularity in the proceedings.

The act of 1858 can only be resorted to, for the purpose of reviewing such frauds or irregularities.

The petitioners have taken the point, that the assessment was not confirmed by the common council, and that the act of 1861, which purports to dispense with such confirmation, is unconstitutional, by reason of not being properly entitled.

We cannot inquire into this objection, for the reason that it is not stated in the petition, and consequently was not passed upon by the court below.

It is claimed on the part of the city, that though there be an irregularity in the assessments, the order setting them aside should be reversed, and a deduction ordered, of the sum erroneously included in the assessment, pursuant to the provisions of the act of April 26, 1870, section 27. (Laws of 1870, p. 903.) That act provides, that if upon the hearing

of proceedings, brought pursuant to the act of 1858, it shall appear that by means of an irregularity, the expense of a local improvement has been unlawfully increased, the judge may order the assessment, upon the lands of the aggrieved party to be modified, by deducting from the assessment thereon, the proper proportion of the excessive expenditure.

The court below held, that this act could not operate on the present proceedings, the hearing thereon having been had before the passage of the act, and the act not being retroactive. We are of the same opinion.

The orders appealed from should be affirmed, with costs.

All concur.

Order affirmed.

THE PEOPLE ex rel. SAMUEL FREEMAN and JOHN H. WHITE, Appellants, *v.* JOHN C. HULBURT, County Judge, etc., Respondent.

The authority of the majority of the tax-payers of a town, to mortgage the whole property of its citizens, against the will of the minority, for investment in a railroad or other corporation, receives no countenance in the principles of the common-law, but is derived solely from legislative enactments. Every step, therefore, required by the statute, must be shown to have been taken in strict conformity therewith.

In proceedings under chapter 967, Laws of 1869, it must appear, either that the tax-payers whose names appear on the petition, who did not sign personally, were present when their names were signed, or authority in writing so to affix their names must be produced.

As it was requisite to establish the fact of the signing to give jurisdiction, it is no answer, that the objection was not taken upon the hearing before the county judge. There was no waiver upon the part of those tax-payers, who did not sign and who did not appear.

Where one signs the petition in a representative capacity, his authority to represent and thus to bind the estate of his ward or *cestui que trust* must be shown affirmatively by legal evidence. (See opinion of POTTER, J., note.)

Where the name of a corporation appears to the petition, its corporate existence, the authority of those signing, to bind it in this manner, and that the corporation is *solvent*, must be proven. (Opinion of POTTER, J., note).

(Submitted June 12, 1871; decided September 2, 1871.)

Statement of case.

APPEAL from judgment of the General Term, third department, affirming order of county judge of Saratoga county, appointing commissioners, etc., under the provisions of chapter 907, Laws of 1869, brought up for review upon writ of certiorari. (Reported below 59 Barb., 446.)

On the 31st day of August, 1870, George S. Batcheller and others, presented their petition to Hon. J. C. Hulbert, county judge of Saratoga county, praying that the "bonds of the town of Saratoga Springs, may be created and issued in the manner specified" in chapter 907, Session Laws of 1869, to the amount of $100,000, and that the said bonds or proceeds thereof, might be invested in the capital stock of the Saratoga, Schuylerville and Hoosac Tunnel Railroad Company, etc.; which petition was verified.

In pursuance of said petition, said county judge made an order appointing September 20, 1870, to take proof of the facts set forth in the petition.

The county judge, upon such petition, made an order appointing Henry W. Merrill, Aaron B. Olmstead, and Edward R. Stevens, commissioners for the town in said proceedings.

A number of persons signed said petition in a representative capacity; no evidence was introduced, showing their right to represent, or their authority to sign in their assumed capacity. The names of several corporations appeared to the petition, and the names of petitioners were signed by others in several instances. These facts appear fully in the opinion of POTTER, J., in note.

The aggregate of property on assessment roll, was $2,318,-170; the amount assessed to the tax-payers whose names appeared to petition, $1,189,394. Deducting amount claimed to be erroneous, $38,024, the petitioners lacked $7,715 of a majority of the taxable property, as appears upon the roll of 1869.

L. Varney, for appellants. The petition was not in accordance with chapter 907, Laws 1869, section 1. (*Robert-*

son v. *Bullions*, 1 Kern., 243.) Statutes like this must be strictly construed. (*Sharp* v. *Spier*, 4 Hill, 76; *Striker* v. *Kelly*, 2 Denio, 323; *Doughty* v. *Hope*, 3 id., 594; 1 N. Y., 79; *Adams* v. *S. and W. R. R. Co.*, 10 id., 330; *Cruger* v. *Daughtery*, Ct. App., Dec. Term, 1870.) The authority to sign the petition must be shown. (6 How. Pr., 98; 9 Johns., 75, 76; 10 id., 114; id., 167.) This court may correct any error of law or fact of an inferior tribunal. (*People* v. *Board of Police*, 39 N. Y., 506; id., 88; *People* v. *Van Alstyne*, 32 Barb., 134; *People* v. *Overseers Ontario*, 15 id., 286, 293; *People* v. *Lawrence*, 54 id., 589; chap. 925, Laws 1871.) The proceedings being statutory, the parties must show their authority for every step taken. (*Norwood* v. *Hollister*, 6 N. Y., 309; *Bodine* v. *Goodwin*, 5 id., 568; *Farrington* v. *Morgan*, 20 Wend., 207.) The return should sustain the proceedings. (*People ex rel. Waldron* v. *Soper*, 3 Seld., 428.) The county judge, being a petitioner as well as a trustee, was disqualified from adjudicating upon the petition. (2 R. S., 463, § 2, 4th ed.; *Oakley* v. *Aspinwall*, 3 Comst., 550; 28 Barb., 503; 17 id., 414; id., 410; 41 id., 200, cases cited; *In the Matter of the Petition of Leefe and Wife*, 2 Barb. Ch., 39; id., 331; *Washington Ins. Co.* v. *Price*, 1 Hopk. Ch., 21; *Sweet* v. *Hulbert*, 51 Barb., 315; *Baldwin* v. *McArthur*, 17 id., 414.)

Batcheller & Hill, for respondent. Presumptions are in affirmance of the judgment, and errors must be shown affirmatively. (*Boyen* v. *Schofield*, 2 Keyes, 628; *Hoyt* v. *Thompson*, 1 Seld., 335; *Bank of Vergennes* v. *Warren*, 7 Hill, 95.) The statute authorizes those representing property, as guardians, trustees, and executors, to sign petition. (2 R. S., part 2, chap. 8, tit. 3, § 20; *Field* v. *Schiefelin*, 7 Johns. Ch., 154; *Holmes* v. *Seely*, 17 Wend., 75–78; *Sylvester* v. *Ralston*, 31 Barb., 289.) The act under which the proceedings were had is constitutional and valid. (*Bank of Rome* v. *Village of Rome*, 18 N. Y., 39; *Starrin* v. *The Town of Genoa*, 23 id., 439; id., 456; 35 id., 555.) The county judge had juris-

diction. (*Bank of Lansingburgh* v. *McKie*, 7 How., 369; *People* v. *Wheeler*, 21 N. Y., 86; Clark's Ch., 190, Moak's ed. and note; *People* v. *Edmunds*; 15 Barb., 530; 17 Barb., 424; 5 Paige, 489; 2 Barb. Ch., 38.) The act should receive a liberal construction. (Smith's Com. on Const. and Stat. Law, § 467; *Whitney* v. *Emmett*, 1 Baldw., 303.)

CHURCH, Ch. J. The authority of a majority of the taxpayers of a town, to mortgage the whole property of its citizens, against the will of the minority, for the purpose of investment in a railroad or other corporation, is derived solely from legislative enactment, and has no countenance in the principles of the common-law, which protects every owner of property in the absolute and unqualified control of it, subject only to the right of the government, to take it by right of *eminent domain* for public use, or to tax it for governmental purposes.

Whether it is competent for the legislature, thus to interfere with the rights of property of the citizen, has been the subject of serious controversy in the legislature and in the courts, but which it is unnecessary to consider in this case. It is well settled upon elementary principles and by repeated adjudications, that when private property is sought to be taken or affected under statutory proceedings, every step required to confer the power, must be shown to have been taken in strict conformity to the statute. (4 Hill, 76; 2 Wend., 323; 10 N. Y., 330.) And this court has held, that this principle was applicable in this class of cases. (*People* v. *Smith*, 45 N. Y., 772.)

It was incumbent upon the petitioners, to prove by legal evidence before the county judge, that a majority of the taxpayers of the town, owning or representing a majority of the taxable property of the town appearing upon the last assessment roll, signed the petition for "bonding the town," as a condition precedent, to the exercise of the authority of the county judge, to appoint commissioners for that purpose.

We think the petitioners failed to establish this fact, for

the reasons set forth in the dissenting opinion of POTTER, J., in the Supreme Court.

With every advantage of personal solicitation, representation and influence, if a clear and undoubted majority of those entitled and qualified to act is not obtained, the extraordinary power of encumbering the whole property of the town ought not to be exercised. In addition to the reasons assigned by Judge POTTER, an examination of the papers shows, that more than $20,000 of property was included in the majority, owned by persons whose names were signed to the petition by other persons, and the only authority was by parol, proven by such persons.

This does not include the amount, in the cases where the owners were present and made their mark. The power or duty conferred upon the tax-payer is one of great importance. It affects not only his own property, but the property of others. It should be exercised by himself, and sound policy and legal analogy require, that he should either be present when his name is affixed, or the authority should be in writing. (See opinion of ALLEN, J., in *People* v. *Smith*, *supra*.) If this sum should be deducted, the amount would be considerable less than the sum required to constitute a majority.

It is true no objection appears to have been taken at the hearing on this ground, but it was necessary to establish all the facts requisite, to confer upon the county judge power to appoint commissioners, and there was no waiver on the part of those who did not sign the petition and did not attend the hearing. The whole proceedings are before us, and we can review any error of law or fact committed by the inferior tribunal. (39 N. Y., 506.)

It is urged by the counsel for the respondent, that the case should be sent back to the county judge for correction under the act of 1871. That act leaves it discretionary whether the case should be remanded or not. We think the proceedings should be reversed and not remanded. If there were no other reasons, it is sufficient that two years have elapsed since the assessment roll, which is made the basis of this proceeding,

Note, dissenting opinion, per POTTER, J., below.

was made. There may have been great changes in the ownership of property during that period, and in the prospects of the projected railway for which the bonds were to be issued. It would be unjust to present owners, to allow former owners to encumber their property in this manner. The present tax-payers should decide the question, and have an opportunity for that purpose; and this can only be done by reversing the proceedings.

All concur. Judgment for reversal of order of county judge.

The following is the dissenting opinion of POTTER, J., below, approved and adopted by the court: [REP.]

SUPREME COURT—THIRD DEPARTMENT.

THE PEOPLE, ex rel. JOHN H. WHITE and others, *v.* JOHN C. HULBERT, County Judge.

POTTER, J. (dissenting opinion.) The act under which these proceedings are instituted, authorized the devesting of individuals of their estates by unusual methods, not known to the common-law, and not known to general provisions of the statutes. It is a proceeding by special statute authority, and in derogation of the principle of the common-law. In all such cases jurisdiction can only be obtained by the strictest observance of the statute authority; nothing can be made out by intendment. The due execution and observance of the power granted must be shown; and in such cases there is no presumption that public officers have done their duty, but every step in the proceeding must be proved to be within the powers conferred by the act. (*Sharp* v. *Spier*, 4 Hill, 76; *Striker* v. *Kelly*, 2 Denio, 323; *Doughty* v. *Hope*, 3 id., 594; S. C., 1 N. Y. R., 79; *Adams* v. *Saratoga and Washington R. R. Co.*, 10 N. Y. R., 330; *Cruger* v. *Dougherty*, Court of Appeals, December term, 1870.) I copy the following extract from an unpublished work, soon to appear: "But it must be kept in mind, however, that whenever, in pursuance of law, the property of an individual is to be devested, by these proceedings against his will, there must be a strict compliance with all the provisions of the law, which are made for his protection and benefit. Those provisions must be regarded as in the nature of condition precedent, which must not only be complied with before the right of the property owner is disturbed, but the party claiming authority, under the adverse proceeding, must affirmatively show such compliance." So, too, it is equally a well settled rule of law, that where a statute requires proof to be made in any proceeding, it must be by *legal evidence;* unless, from the language of the statute, it is intended to be by affidavit; or where, from some qualifying language in the context, it is

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apparent that the legislature intended some other method of proof than the best legal evidence. (*Buffalo and State Line R. R. Co.* v. *Reynolds*, 6 How. Pr. R., 96; *Brown* v. *Hitchman*, 9 John., 75, 76; *Terry* v. *Fargo*, 10 id., 114; id., 167.) Things to be proved must be established by competent and satisfactory *legal* evidence. (1 Greenleaf's Ev.. § 1.) It has lately been decided in the Court of Appeals, "*In the matter of the application of the Rensselaer and Saratoga R. R. Co.* v. *Davis*," (reported in the Albany Law Journal, No. 57), "that the taking of private property for public use is in derogation of private rights, and in hostility to the ordinary control of the citizen over his estate, and is not to be extended by implication. To authorize the taking of land under the right of eminent domain, the express authority must be shown." Guided by these rules in the construction of the act of 1869 (chap. 907), under which these proceedings were taken, the second section of the act makes it the duty of the judge, at the time and place named in the notice, to proceed *to take proof* as to the said allegations in said petition, etc. This means *legal proof*. What were those allegations? Among other things, they are, that the petitioners are a majority of the tax-payers, or that they represent a majority of the said tax-payers, and that they desire bonds to be issued; and bonding the town and creating a liability against the town and against the taxable property to the amount of $100,000. These were the things to be proved, and proved by legal evidence. Such legal proof, I think, was not produced before the county judge, as showed that a majority of the tax-payers and representatives of a majority of them had petitioned for the issuing of these bonds. A considerable portion of the taxable property of that municipality, to be devested, diminished, or made liable to the proposed tax or liability, belonged to infants, who were represented by guardians. The property of infants is always, and in an especial manner, under the protection of the court, and every act, calculated to affect their interests injuriously, the courts are ever jealous to regard; and whenever the court can discover any dereliction of duty on the part of guardians or trustees of infants, they will be careful to require, at least, that all the forms of law shall be observed, and they will not allow guardians or trustees to be guilty of devastation of the estates of their wards or *cestus que trusts*, or to put them at hazard. Upon the tax roll was an assessment of $2,000 against "the Shepherd children." This was claimed as a part of the majority of the taxable property petitioning for the bonds. The authority for this petition is the signature of one "John C. Shepherd, for Shepherd children." No authority was proved. But, it is now said, that the county judge did not count this in as a part; and it is now alleged that the relators must affirmatively show that he did, in order to predicate error upon it. It is charged upon oath, that the judge did so count this assessment as a part of the petition of the majority. The certiorari calls upon him to make return of all acts and decisions made by him, and his return entirely omits to state whether or not he did allow the said assess-

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ment, and the petition thereon, to be counted with such majority. The burden of showing want of jurisdiction is not with the relators, but by the party claiming jurisdiction, to show it when called upon. It is not, therefore, with good grace that, upon such a return, the respondents should seek to cast this burden upon the relators. But, besides this, there is the evidence of Mr. Batcheller, in which he enumerates the names that were omitted, and this is not among the omissions. Another case is that of the Congregational church, whose name is upon the assessment roll "Congregational Society," but who petitioned for the issue of these bonds by the name of the "First Congregational Society," $9,400, which was signed by Doctor L. E. Whiting, Solon B. Bushnell, and Levi S. Packard, under their corporate seal, and authorized by a resolution of the board of trustees. First. There was no legal or other proof before the county judge of the existence of such a corporation as is represented by the assessment roll, tax list or signatures; and if there had been such evidence, there was no power in this board of trustees to create such a liability against the property of the corporation they represent. A religious corporation, created under the general statute, consists not of the trustees alone, but of the whole members of the society. It is the society that is incorporated, not the trustees; and its members are the corporators. The trustees are only the managing agents or officers of the corporation, in charge of the temporal affairs of the society, with powers specifically conferred by the statute; but with no other powers. They cannot alien, mortgage or encumber the estate of the corporation but by permission of the court, except to mortgage for debt, under certain circumstances. (*Robertson* v. *Bullions*, 10 N. Y. R., 343.) Their powers being specified by the statute, this specification excludes all other powers; and to devastate and create liabilities is not among the specified powers. They neither proved to the judge their corporate existence, nor any power to sign such a petition. The act of 1869 confers no new power upon them. While it allows representatives of taxable property to petition, it is to be construed to mean legal representatives, especially in an act which would devest individuals or corporations of their estates. The county judge was bound to exclude this petition upon the evidence produced before him. This was to the amount of $9,400. Before the act of 1869, so would have stood the case at common law and statute. But it is claimed that there is an express provision in the act of 1869, that allows corporations to become petitioners. This is true. It permits, however, only *solvent* corporations so to petition; and the burden of proving solvency was with the petitioners. This was necessary to confer jurisdiction upon the judge. This was not done. In this case the judge has presented to us the proof, but its *solvency* was *not* proved. Another petitioner was that of the Baptist church, representing $740, set forth on the petition, "S. B. Terwilliger, W. Waterbury, Baptist church." This authentication is still more defective than that of the Congregational church. The only evidence in

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this case is, that the two persons named signed the petition. It does not appear that they were even members or trustees of this church; much less, that they were authorized to sign a petition to encumber their property The same remarks apply to this case as to that of the Congregational church. Another petitioner, whose name upon the assessment roll stands as follows: "Wiebelzahl Wm., Mrs. $460." Upon the petition is the same name, with the addition at the end, "administratrix." There is no other name on the tax list that resembles this, and the name, "as administratrix," added, is allowed to be a petitioner, with no proof that she is such administratrix; nor is it easy to see how an administratrix can vote to encumber *real estate*, which generally belongs to the heirs-at-law. To entitle her to petition she must be a legal representative of the real estate assessed. Another petitioner whose name was upon the assessment roll was "the Red Spring Company," $560. The return does not show by whom this petition was signed; and there is the absence of all evidence that anybody was authorized to sign for this company, as well as the want of evidence of *solvency*, in order to confer jurisdiction upon the judge.

There were several petitioners claiming to represent estates, viz.: Simeon H. Barrett's estate, $600; C. Buell's estate, $600; Nelson Burnham estate, $360; William Putnam estate, $1,000. There is no legal evidence in the case that the persons signing the petition legally represented these estates or had authority to sign the petition. The name of Elvira Putnam appears upon the tax list for $200. The petition is signed by her as administratrix, without evidence of authority, or rather with the presumptive legal evidence that she possessed *no* authority. Among the petitioners is "Walter Barrett estate." What amount of estate this petition represented, cannot be determined, as no such name is found on the assessment roll for 1869; but adjoining and next to two names of Barrett is "Walter Balfour," and there is no other name upon the roll so nearly resembling it. This name represents $1,500. There is either no proof to make this petition good for any amount, or if it represents an estate, there is the additional defect of proof of authority; or if it is a clerical error, meaning "Balfour," then it is the representative of $1,500. If it be neither of these, the name is not on the tax list. The burden was upon the party claiming jurisdiction from it to show this and to show how much he represented by his petition; it may have been received for a very large amount.

There also appeared upon the list of taxable estates the name of George S. Batcheller, guardian, $6,666. In this case Mr. Batcheller, being sworn, proved himself to be guardian of the Cook estate, but did not offer any evidence of his authority to encumber the estate of his wards or to commit devastation of it. He had no authority at common-law or by statute, unless the statute of 1869 can be stretched to authorize the estates of his ward to be thus devested, which, as we have already stated, is not the rule by which such statutes are to be construed. Had he applied to the

Statement of case.

court for permission so to encumber it, it would have been refused. The same remark will apply to the petition of "John C. Hulbert, guardian," $2,000; to which it may be added, that in the latter case, there was no evidence of the existence of guardianship, nor of the name of the estate, or persons for whom he was guardian. The name of D. B. Harrington was also included, who was a petitioner to the amount of $6,000. This was also proved before the judge, and by the testimony of Mr. Batcheller. His petition was not excepted from the amount estimated as a part of the majority. The name of D. B. Harrington is not upon the assessment roll presented before us, nor any name that resembles it, representing any such sum.

The taxable value of the property of the town is, by the assessment roll, $2,318,170; one-half of this is	$1,159,085 00
The petitioners allowed by the county judge seem to be..	1,189,894 00
Making a majority upon the petitions of.....	30,804 00
The errors above pointed out, exclusive of the petition of Walter Barrett, the amount of which does not appear, is,	30,586 00
Falling short of a majority	177 00
But adding Walter Barrett, upon the assumption of a clerical error in his name.....	1,500 00
There is a failure of a majority by.....	1,677 00

If I am right in these views, we need not discuss the other questions in the case. It is a question of jurisdiction. Jurisdiction was questioned; the writ called upon the actors to show their authority; the strictest construction of the statute was demanded.

I think jurisdiction has not been shown, and that the proceedings should be set aside.

WILLIAM M. LOWRY et al., Appellants, *v.* WILLIAM H. INMAN, Respondent.

46	119
119	402
46	119
147	281
148	27
46	119
162	187
162	189

Stockholders in a banking corporation are only personally liable, or their individual property chargeable for the debts of the corporation, to the extent, and as prescribed by the charter. By the act of becoming stockholders they assent to the terms, and assume the liabilities imposed by the act creating the corporation. The obligations thus assumed are limited by the terms of the charter, and cannot be extended by implication beyond the terms of that instrument, reasonably interpreted. If a general personal liability is created, it may be enforced by a personal action, as other personal obligations are enforced. If the charter merely

permits the individual property of stockholders to be levied, and taken upon execution, on a judgment against the corporation in a given contingency, and provides that the same process may be used and enforced by the stockholders whose property is first taken, against the property of the other stockholders, so as to compel a ratable contribution by all, no general individual liability is created for which a personal action can be brought. In such a case the creditor of the corporation is confined to the remedy against the stockholders and their individual property given by the act.

Where the individual property of the stockholders is made liable for the debts of the bank, either absolutely or conditionally, and by a specified process, an indorsement upon the bills of the bank of the words, "individual property of stockholders liable," is but notice of the charter liability, and of itself gives no rights of action to the bill-holders against the stockholders, or against the president or cashier of the bank signing the bills officially. The bill-holders, by means of such indorsement, acquire no rights against the officers or stockholders or their property other than such as are given by the charter, with which all persons dealing with the corporation or receiving its obligations are supposed to be conversant.

(Argued June 7th, 1871; decided September 2d, 1871.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming order and judgment of the spring term, sustaining defendant's demurrer to plaintiff's complaint.

The complaint alleges, that the defendant was a citizen of Georgia, and a stockholder of the North-western Bank of Georgia, owning at the time of the issuing of the bills sued on, and at the present time, $25,000 of the stock, par value, being one-eighth part of the stock of the bank.

The complaint further alleges, the issuing of divers bills or notes by said bank; the ownership thereof by the plaintiffs; the bringing of a suit thereon against the bank; the service and appearance of the bank; the defence of the action on the merits; and the recovery of a judgment against the bank; the issuing of an execution against the property of the bank, and the return thereof unsatisfied.

That the defendant, as president or cashier of said bank, signed a part of said bank bills, containing the words "*individual property of stockholders liable*," and issued the same.

That the plaintiffs gave value for said bills, knowing of said words, and relying upon the assertion of the defendant, that the stockholders of said bank were individually liable for said bills.

Section 18 of the charter, under which defendant's liability is claimed to arise, is as follows:

Section 18. "And be it further enacted by the authority aforesaid, that no one shall subscribe for or own or purchase stock in said bank, unless he or she be a citizen of Georgia, and one-third of said stock shall be subscribed for by citizens of Georgia.

"The private or individual property of each stockholder, as well as their joint property, shall be liable for the redemption of the bills of said bank, and for the payment of all the debts and liabilities of the same, and when any judgment shall be obtained against said bank, and execution issued thereon, it shall be the duty of the levying officer, first to levy the same on the property of said incorporation, and to sell the same; and if the proceeds thereof shall be insufficient to pay off said execution, and the return of said officer, of no corporate property shall be sufficient proof of the same, it shall be the duty of said officer, next to levy said execution on the individual property of any stockholder or stockholders, and sell the same, until an amount is raised sufficient to pay off said execution; provided the same is not for a greater amount, than the value of the stock of the stockholder whose property is levied upon, and if for a greater amount, in that case an amount equal to the amount of his stock. And judgment obtained against said bank by any creditor, shall not only bind the property of said bank, but shall also bind the individual property of each stockholder, to the amount of his stock, without the necessity of bringing any suit against the stockholders; and service of a copy, in substance, of the declaration and process upon the president or cashier of said bank, shall be adjudged sufficient service and notice, both to said bank and to each stockholder therein, to render the property of said bank, and the individual property of each stockholder

therein, subject and liable for the payment of any judgment which may be rendered against said bank, each stockholder to be liable in proportion to the amount of his stock, for the entire indebtedness of said bank; and any stockholder who pays off any such execution or part thereof, shall have the right to use and control the same *fi fa*, against all the other stockholders, so as to collect the ratable share of each of them."

Defendant demurs to the complaint, that it does not state facts sufficient to constitute a cause of action.

F. C. Barlow, for the appellants. That the remedy given by statute must be as broad as the right; otherwise it is not exclusive. (*Buckford* v. *Hood*, 7 Term R., 620; *Smith* v. *Lockwood*, 13 Barb., 217; *Atwood* v. *R. I. A. Bank*, 1 R. I., 376; *Ex parte Van Riper*, 20 Wend., 616.) The liability exists at common-law. (*Allen* v. *Sewall*, 2 Wend., 338; *Moss* v. *Oakley*, 2 Hill, 265, 269; *Bailey* v. *Bancker*, 3 Hill, 188; *Harger* v. *McCulloughs*, 2 Denio, 119, 123; *Paine* v. *Stewart*, 33 Conn., 516, 530; *Abbott* v. *Aspinwall*, 26 Barb., 207; *Merchants' Bank* v. *Bliss*, 35 N. Y., 414; *President of Waterford Co.* v. *The People*, 9 Barb., 172; *Almy* v. *Harris*, 5 Johns., 175; *Dudley* v. *Mayhew*, 3 N. Y., 15; *Moss* v. *Averill*, 10 id., 459; *Corning* v. *McCullough*, 1 Comst., 47; *Story* v. *Furman*, 25 N. Y., 221.) The right being a common-law one, the remedy should be also; and the creditor is not confined to the statutory remedy, at least in this State. (*Ibbotson* v. *Poughkeepsie Bank*, 24 Wend., 473; *Dauchy* v. *Brown*, 24 Vt., 205, 206; *Smith* v. *Spinola*, 2 Johns., 199; *Whitmore* v. *Adams*, 2 Cow., 632; *Hinkley* v. *Mareau*, 3 Mason, 90; *Titus* v. *Hobart*, 5 id., 378; Story Confl. Laws, §§ 570, 571; *De La Vega* v. *Viana*, 1 Barn. & Adol., 288.) Defendant is estopped by the words on the bills. (*Atwood* v. *Agricultural Bank*, 1 R. I., 376.) Defendant bound by the judgment against the bank. (*Starbuck* v. *Murray*, 5 Wend., 159; *Becquet* v. *McCarthy*, 2 B. & A., 951; *Douglas* v. *Forest*, 4 Bing., 702, 703; *Sumner* v. *Marcy*, 3 M. & W., 115;

2 Phill. Ev., 200–202, note; *Valer* v. *Dumesque*, 4 Exch., 303; *Marcy* v. *Clark*, 17 Mass., 333; *Brewer* v. *Gloucester*, 14 id., 216; *McRae* v. *Mattoon*, 13 Pick., 53; *Kelsall* v. *Marshall*, 1 C. B., N. S., 241; *Bank of A.* v. *Hanling*, 9 C. B., 687.) The tendency of the courts is to amplify remedies. (*Russell* v. *Smith*, 9 M. & W., 818.)

John H. Reynolds, for respondent. That respondent is not a party to the judgment in Georgia, and therefore is not bound. (Brooms Comm., 263, ed. 1864, De Grey, C. J., in *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 573, note; *Mills* v. *Duryee*, Buller's Nisi Prius, 233; *McElmoyle* v. *Cohen*, 2 American Leading Cases, 790, et seq.; *Green* v. *Sarmiento*, 1 Peters, C. C. R., 74; *Whitman* v. *Cox*, 26 Maine, 339.) It was a proceeding *in rem*, and has no extra territorial effect. (*Bates* v. *Delavan*, 5 Paige Ch. R., 299; *Cunningham* v. *Pell*, 5 Paige Ch. R., 611; Story's Confl. of Laws, §§ 322, 328, 432, 575, 539, 546, 547; *De Witt* v. *Burnett*, 3 Barb., 89; Broom's Maxims, "*audi alteram partem*," 80; Westlake's Private Inter. Law, Art., 388; *Buchanan* v. *Rucker*, 1 Camp, N. P. R., 67; 2 Cowen & Hill's Phillips on Evidence, p. 203, note 306; 1 Green's Ev. §§ 522, 523, 541; Story on Confl. of Laws, §§ 539, 546, 547, 586–590; 8 Cowen R., 311; Cowen & Hill's Phillips on Ev., *supra*; 2 Smith's Leading Cases, 573, notes.) The section of the charter referred to, is in derogation of the common-law, and will be restrained within its literal import. (Sedgwick on Stat. and Const. Law, 313, 319, 147, 351; *Bussing* v. *Bushnell*, 6 Hill, 382; *Benjamin* v. *Benjamin*, 1 Seld., 383; *Allen* v. *Miller*, 17 Wend., 202; *McGuen* v. *Regan*, 2 Wheaton, 25; *Bloom* v. *Bundick*, 1 Hill, 130; *Bigelow* v. *Stearns*, 19 John's, 39; *Powell* v. *Tuttle*, 31 Coms., 396; *Olmstead* v. *Elder*, 1 Seld., 144; *Sherwood* v. *Reade*, 7 Hill, 431; *Thatcher* v. *Powell*, 6 Wheaton, 119; *Jackson* v. *Esty*, 7 Wend., 148; *Parker* v. *Overman*, 18 How., U. S., 137; *Garrison* v. *Howe*, 17 N. Y., 464; *Bird* v. *Haydon*, 2 Abb., N. S., 66; *People* v. *Lambier*, 5 Denio, 9; *Bennet* v. *Ward*, 3 Cai.,

259; *McCluskey* v. *Cromwell*, 11 N.Y., 593; *Rathbun* v. *Acker*, 18 Barb., 393; *B. and U. R. R. Co.* v. *Robins*, 22 Barb., 662.) In no view does the section impose an individual liability. (Broom's Maxims, 514, 582, Marg., 415; 2 Bl. Com., 380; *Lane* v. *Morris*, 10 Georgia R., 168; *Patterson* v. *Baker*, 50 Barb., 432; *Lane* v. *Thornton*, 11 Georgia R., 497.) Section 18 can ground no action before a foreign tribunal. (*Ferusson* v. *Fyffe*, 8 Cl. & Fin., 121; Story's Confl. of Laws, Ch., 14, §§ 556–558; 2 Kent's Comm., 559, ed. 1866; Broom's Comm., 45, 46; Wheaton's Inter., Law, 139; Westlake Private Inter. Law, Art., 468, Art., 166; *Watrip* v. *Pierce*, 35 N. H., 582; *Titus* v. *Hobart*, 5 Mason, 379; *Pickering* v. *Fisk*, 6 Verm., 102; *Donn* v. *Lippmann*, 5 Cl. & Fin., 1.) The party seeking for redress is restricted to the statutory remedy. (Ch. WALWORTH in *Renwick* v. *Morris*, 7 Hill, 575; BRONSON, C. J., in *Stafford* v. *Myerhoff*, 3 Hill, 40; SAVAGE, C. J., in *McKeon* v. *Caferty*, 3 Wend., 495; Ld. TENDERTON in *Rochester* v. *Brydges*, 1 B. & Adol., 847; Ld. CAMPBELL, C. J., in *Couch* v. *Steele*, 3 El. & Bl., 44; *Hinsdale* v. *Larned*, 16 Mass., 65; *Gedney* v. *Inhabitants of Tewksbury*, 3 Mass., 307, 309; *Henniker* v. *Contoocook V. R. R.*, 9 Foster, N. H., 147; Sedgwick on Stat. and Const. Law, 94, 402, et seq.; *Moncrief* v. *Ely*, 19 Wend., 405; *Stevens* v. *Evans*, 2 Burrow, 1152, 1157; 2 Inst., 200; Com. Digest, Action upon Statute C.; *Crittendon* v. *Wilson*, 5 Cowen, 165; *Dudley* v. *Mahew*, 3 N. Y., 9; *Smith* v. *Lockwood*, 13 Barb., 209; *Hardeman* v. *Bowen*, 39 N. Y., 199; *Sumner* v. *Marcy*, 3 W. & M., 106; *The People* v. *Hazard*, 4 Hill, 207; *Almy* v. *Harriss*, 5 Johns., 175; Smith on Stat. and Const. Construction, §§ 661, 664, 667; Dwarris on Stat., 667; *Erickson* v. *Nesmith*, 15 Gray, 221; S. C., 3 Allen, 223; 3 Kent's Comm., 27, ed. 1866; SHAW, C. J., in *Gray* v. *Coffin*, 65 Mass., 199; DEWEY, J., in *Erickson* v. *Nesmith*, 86 Mass., 285; *Andrews* v. *Collinder*, 13 Picker, 490, An. & Am. on Corporations, 388 n., 597, 602 and n., 613; Parsons on Contracts, 143; *Patterson* v. *Baker*, 50 Barb., 432; 1 Lindley on Partnership, 4; *Sumner* v. *Marcy*,

3 Wood & M., 106; *Erickson* v. *Nesmith*, 15 Gray, 221; 4 Allen, 223; *Hinsdale* v. *Larned*, 16 Mass., 65; *Halsey* v. *McLean*, 12 Allen, 438; *Bank of Australasia* v. *Nias*, 16 Q. B., 734; *Winter* v. *Baker*, 5 Barb., 432.)

ALLEN, J. No personal liability attaches to the defendant, by reason of the words, "individual property of stockholders liable," appearing upon the face of the bills issued by the bank, and signed by the defendant, as one of its officers. It was but the literal statement of a fact, as it existed.

The extent of such liability, the qualification attached to it, and the manner of its enforcement, are not stated. The liability exists under, and is modified and limited by, the statute creating the corporation; and the indorsement, made to give credit and currency to the bills, had respect to the provisions of the charter, and was not made or understood as an independent undertaking of the stockholders, or as a representation of a liability, other than such as the statute creating the corporation designated.

Every person dealing with a corporation, or receiving its obligations, is supposed to be cognizant of the provisions of its charter.

The representation of the indorsement is, that the individual property of stockholders is liable for the payment of the bill, and the statute declares the same in the same words; and the defendant, by subscribing to the stock and becoming a stockholder, has consented and agreed that his individual property, shall be liable for the redemption of the bills of the bank, according to the terms and in the manner indicated by the act. The sole question is upon the interpretation and effect of the statute, as that defines the character and extent of the liability assumed by stockholders. The indorsement upon the bills, is but a notice to the public of the charter liability.

A personal liability of stockholders for the debts of a corporation, in virtue of the charter, is not in the nature of a penalty or forfeiture, and does not exist solely as a liability imposed by statute. It is not enforced simply as a statutory

obligation, but is regarded as voluntarily assumed, by the act of becoming a stockholder. By such act he assents to be bound, or that his property shall be charged with debts of the corporation, to the extent and in the manner prescribed by the act of incorporation.

By the act of incorporation, corporators may enjoy absolute immunity from liability upon or for corporate obligations, or they may be liable absolutely, and to the fullest extent, for every corporate debt, as if no corporation existed; and there may be every shade and degree of liability, either personal or of property, between the two extremes. The legislature, in qualifying and modifying corporate rights and individual liability, may prescribe the limits of each, as well as the forum in, and the proceedings by which any liability imposed may be enforced.

The intent of the legislature is the foundation of the liability, and that being ascertained from the words of the charter, every other question is readily solved. In many charters the intent is obvious, to impose an absolute liability on the stockholders. In all such cases the liability is personal, and, following the person, may be enforced as other personal obligations are enforced, and according to the course of procedure, in the place where the individual sought to be charged is found. It is not in such case a statutory remedy, or a liability based upon a statute, and which is confined in its operation, to the limits of the sovereignty creating the corporation, and without extra territorial force or obligation. It is like other obligations, assumed in the form prescribed by the laws of the place where made, and, being valid there, is enforceable everywhere. Its validity, interpretation and effect are to be determined by the *lex loci;* but the remedy is governed by the *lex fori.*

If therefore, the act of the legislature of Georgia, incorporating the North-western Bank of Georgia, had declared, in terms, that each stockholder should be individually liable, for the redemption of the bills and payment of the debts of the bank, or that the stockholders generally, or jointly and

severally, or otherwise, should be so liable, there would be no doubt, upon principle, or the decisions of our own courts, that the courts of this State would be open to a creditor of the bank, to enforce the liability of a stockholder for the payment of such debt, according to the terms of the charter. (*Corning* v. *McCullough*, 1 Comst., 47; *Hawthorne* v. *Calef*, 2 Wall., 10; *Ex parte Van Riper*, 20 Wend., 616.)

Any words importing a personal liability, will be equivalent to an express declaration, and sufficient to give the right of action; and, for present purposes, it may be assumed that general words, without limitation or qualification, charging the property, real and personal, of the stockholder, with the debts of the corporation, would create a personal liability. But the intent of the legislature to enforce, and of the stockholder to assume this liability, must appear from the language employed, giving every part of the instrument its proper force and meaning. If, taking every part of the act touching the liability of stockholders, or their property, and giving the words their usual and ordinary signification, where they do not appear to have been used in a peculiar or unusual sense, and interpreting it as a whole, it is evident, that the intent was not to create a general personal or property liability, but to charge the property of the stockholders, and that not generally, or by the usual and ordinary process, but conditionally, and by a peculiar and unusual procedure. only available in the courts of that State, not only limiting and prescribing the security and rights of the creditor, and the obligation and liability of the stockholder, but prescribing the remedy, going with it and as a part of the right, a general personal liability will not attach to the stockholder.

The operation and effect of the statute, or the liability of the stockholder, which is measured by it, cannot be extended by implication. There is no implied undertaking of the defendant as a stockholder of the bank; and there is no obligation resulting from that relation, other than such as is expressed in terms, or by necessary implication in the act of incorporation.

The plaintiffs must bring the case, within the four corners of that instrument or fail in their action.

If the charter does not impose an obligation, upon which an action could be brought and a personal judgment given, as upon any other contract liability, to be enforced against the person or property of the judgment debtor, as allowed by the *lex fori*, the demurrer is well taken. The right to an independent, personal action, as well in Georgia as elsewhere, is claimed and must be maintained if this action can be sustained; for if no action would lie in Georgia, it is because the statute has provided another and adequate remedy, and has restricted the parties to that remedy.

An action *in personam*, giving the persons all the rights and remedies incident to a judgment in such action, is very different from a proceeding by special process *in rem*, either against specified property, or the property at large of the debtor.

If the charter merely makes the private property of stockholders liable, for the fulfillment of the contracts of the company, and points out no mode in which this liability may be made available, and the courts of other States may give effect to the provision, the course of proceeding must be regulated, by the law of the State where the remedy is sought to be enforced. (*Drinkwater* v. *Portland Marine Railway*, 18 Maine, R., 35.)

If such had been the provision of this charter, the question would be material, whether such a provision, standing by itself, did subject the stockholder to a general individual liability. If, however, the effect of this charter, and the substance of the obligation of the corporation, is not, to charge the property of the stockholder generally, but only to an amount equal to his stock, upon prescribed conditions and by a specific process, the remedy of the creditor must be sought, according to the terms and by the means provided by the charter.

The right of creditors of the corporation, against the corporators, rests upon the statute, and the assent of the stockholders to its terms and conditions, and the same statute gives

the remedy, and within well settled rules the party is confined to the remedy given. (*Renwick* v. *Morris*, 7 Hill, 575; *Stafford* v. *Ingersoll*, 3 id., 38; *McKeon* v. *Caherty*, 3 W. R., 494; *Moncrief* v. *Ely*, 19 W. R., 405; *Hardmann* v. *Bowen*, 39 N. Y., 196.)

Whether the obligation is imposed, and the remedy given solely by the statute, or rests upon the assent of the stockholders to the terms and conditions of the act, the result is the same; the obligation, or liability, and the remedy, are inseparable; and the party interested is confined to the remedy prescribed by the act, and assented to by the stockholder. If the liability rested solely upon contract, and the contract provided an adequate remedy, the parties would be restricted to that remedy. Every other remedy would be excluded by necessary implication.

The terms and conditions of a contract, have the force of law over those who are parties to it. *Modus et conventio vincunt legem.* (2 Rep., 73.)

The provision touching the liability of corporators, for the debts of the corporation, is found in the eighteenth section of the charter, which is devoted to that subject. It does not, in terms, declare that stockholders shall be individually or personally liable for the debts of the corporation. It first declares, that none but citizens of the State shall subscribe for, or own, or purchase, stock in the bank. The act did not contemplate a necessity, for any obligation or liability of extra territorial force. It then enacts, that the private or individual property of each stockholder, shall be liable for the redemption of the bills, etc., and in the same sentence proceeds to dictate, the circumstances and conditions under and upon which, as well as the particular process by which, the liability shall be enforced, and the property of the stockholders subjected to the payment of the debts of the bank, to wit, by an execution upon a judgment against the bank. In a subsequent clause of the same section, provision is made, for the use and control of the same process, to do equity between the stockholders, and compel a ratable contribution from all. The act provided,

as the appropriate remedy, that a judgment and execution against the corporation should be a lien upon, and be enforced against, the individual property of the stockholders made liable by the act. It in terms, made the property liable upon a judgment and execution against the bank, to which the stockholders were not parties, and the property was not made liable in any other way or by any other process. It is very evident, that an independent action would not lie in Georgia, against the stockholders of this corporation, for the obvious reason, that an adequate remedy is provided by this act, without action, and if not, then it cannot be maintained elsewhere. The act only charges and binds the property of the stockholder, by subjecting it to execution in satisfaction of a judgment against the bank, and makes the same process do equity between all the stockholders; and this cannot be done by any other process, or by the courts of any other State.

The remedy is necessarily confined to the sovereignty of Georgia, and can have no recognition or effect beyond the boundary of that State. The charter creates no right and imposes no obligation disconnected with the prescribed remedy, which is local in its character, and not capable of being enforced without the State of Georgia. A foreign tribunal cannot enforce it. (*Pickering* v. *Fisk*, 6 Verm., 102; *Ferguson* v. *Fyffe*, 8 Cl. & Fin., 121; Story on Conflict of Laws, § 556 and *seq.*)

The case was well considered and well decided, by the Superior Court of the city of New York, both at Special and General Term, and the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

The Madison Avenue Baptist Church, Appellant, v. The Baptist Church in Oliver Street, etc., Respondent.

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Under the act to provide for the incorporation of religious societies (chap. 60, Laws of 1813, 3 Edmonds, Stat. 687), the trustees of such a corporation are authorized to act in its behalf, in taking the steps required by section 11, for the purpose of effecting a sale of its real estate, and their acts are binding upon it, although it does not appear they had the express sanction or authority of a majority of the corporation.

Religious corporations have no common-law rights to alienate their real estate, and to constitute a sale within the meaning of section 11; there must be a valuable consideration inuring to the corporation as such. Therefore, an order of the Supreme Court, authorizing a conveyance founded upon a petition, showing the only consideration for the contemplated transfer, to be a benefit to the individual corporators, is without jurisdiction, and a deed executed in pursuance thereof is void.

(Argued June 1st, 1871; decided September 5th, 1871.)

Appeal from judgment of the General Term of the Superior Court of the city of New York, affirming judgment entered upon decision of the court in favor of defendant.

This is an action of ejectment, brought to recover the possession of certain real estate, situate upon Madison avenue in the city of New York, conveyed to the defendant by plaintiff, by deed dated October 21, 1862, which deed was executed in pursuance of orders of the Supreme Court, dated October 17th and 20th, 1862. The facts disclosed by the petition, upon which said orders were granted, and which have a bearing upon the questions determined, are set forth in the opinion.

George F. Comstock & C. C. Landell, for the appellant. That an action of ejectment is the proper remedy. (*Wheaton* v. *Gates*, 18 N. Y., 395; *Deming* v. *Corwin*, 11 Wend., 647; *Rogers* v. *Dill*, 6 Hill, 415; 15 Wend., 448, per Bronson, J.; 20 Wend., 378, 379, per Walworth, C.; 20 Wend., 384–386, per Verplanck, Sen.; 8 How., U. S., 536–544, per Wayne, J.; 8 How., U. S., 552–558, per Nelson, J.) The real estate

of religious corporations inalienable, save under the provisions of section 11. (See *De Ruyter* v. *St. Peter's Church*, 3 Comst., 238, 240–241; Willard's Eq., Jur., pp. 734, 735; 2 Kent's Com., 281; See *De Ruyter* v. *St. Peter's Church*, 3 Barb. Ch., 119, 122; *Bogardus* v. *Trinity Church*, 4 Paige, 178, 198; act of June 19, 1703, Smith & Livingston's Laws of N. Y., p. 52, ch. 128.) The conveyance not authorized by section 11. (*Robertson* v. *Bullions*, 1 Kern., 243; *Williamson* v. *Berry*, 8 How., U. S., 495, 544; *Wyatt* v. *Benson*, 23 Barb., 327; *Stow* v. *Wise*, 7 Conn., 19; *Wiggin* v. *Free Will Baptist Society*, 8 Met., 301.) Religious corporations can only convey, for purposes for the benefit of the society. (*Wheaton* v. *Gates*, 18 N. Y., 395, 403.)

William R. Martin & J. Emott, for the respondent. That plaintiff had the power to convey, inherent in themselves as a corporation. (*Mayor, etc., of Colchester* v. *Lowton*, 1 Ves. & Bea., p. 244, 1813; *Dutch Church in Garden Street* v. *Mott*, 7 Paige, p. 83; 4 Kent, p. 5, § 1; 2 Kent, 281, § 4; *Barry* v. *Mercht. Ex. Co.*, 1 Sand. Chy., p. 293; *Robertson* v. *Bullions*, 1 Kern., p. 251; *Baptist Church* v. *Wetherell*, 3 Paige, 300; *The Dutch Church* v. *Mott*, 7 Paige, 84; *Bowen* v. *Irish Presb. Soc.*, 6 Bos., 267.) Section 11 was fully complied with. (*Bowen* v. *Irish Presb. Church.*, 6 Bosworth, p. 266, 267; *Brick Presb. Church*, 3 Edwards' Chy., 155; *Demarest* v. *Ray*, 29 Barbour, 563.) No objection to order, that it does not sufficiently direct application of proceeds. (*De Ruyter* v. *St. Peter's Church*, 3 Coms., 238; 3 Barb. Chy., 120; *Wheaton* v. *Gates*, 18 N. Y., 402.) Plaintiff has no right to claim the transaction to be *ultra vires*. (*Bissell* v. *Mich. So. R. R. Co.*, 22 N. Y., 258; *Parish* v. *Wheeler*, 22 N. Y., 494.) Although the transaction amounted to a surrender by plaintiff, that would not invalidate it. (*Slee* v. *Bloom*, 19 J. R., 474; *Trustees Vernon* v. *Hills*, 6 Cowen, 26; 1 Bouvier Institutes, § 104, subd., 1; *Smith* v. *Smith*, 3 Dess. Eq. R., S. C., 571, 575; *Woodbridge* v. *Allens*, 13 A. & Ellis, 269.) The transaction cannot now

be questioned, as it was consummated, and the parties cannot be reinstated. (*Parish* v. *Wheeler*, 22 N. Y., 494; *Bissell* v. *M. S. & N. I. R. R. Co.*, 22 N. Y., 258; *E. C. R. Co.* v. *Hawks*, 5 H. L. C., 331; 39 L. J. Exch., 217; 4 Hurl. & C., 409; 39 L. J. Exch., 217; L. R., 4 H. L. Cases, 628; 22 N. Y., 274; 2 J. & H., 408; *Ramsey* v. *People*, 19 N. Y., 41; *Mount* v. *Morton*, 20 Barb., 123; *Baker* v. *Lorillard*, 4 Coms., 257; *Tilton* v. *Nelson*, 27 Barb., 595–608.) The orders of the Supreme Court cannot be impeached collaterally. (18 N. Y., 397; 15 Wend., 436; 20 Wend., 378; 7 John. Ch., 182; 3 Seld., 352; 15 N. Y., 617; *Duchess of Kingston's case*, 2 S. Leading Cases, Am. ed., 668–693; *Castrique* v. *Imrie*, *House of Lords*, 1870; 39 L. J., C. P., 350; L. R., 4 H. L. Cases, 414.) The application by the trustees, was the act of the corporation and was sufficient. (In *Barnes* v. *Perine*, 9 Barb., p. 206; S. C. 2 Kern., p. 25; *Trustees First Bap. Soc. Syracuse* v. *Robinson*, 21 N. Y., p. 237; *The People* v *Runkle*, 9 Johnson, p. 157; *Bayley* v. *Onondaga Ins. Co.*, 6 Hill, 476; 6 Cow., 27; 14 Conn., 594; 20 How., 325; *Lee* v. *M. E. C. Fort Edward*, 52 Barb., 116; *St. Ann's Church*, 23 How., 285; *Wyatt* v. *Benson*, 23 Barb., 327.) The conveyance was authorized by the corporators. (*People* v. *Van Slyke*, 4 Cow., 297; *People* v. *Ferguson*, 8 Cow., 102; *People* v. *Vail*, 20 Wen., 12; 7 Cow., 402, 409, 410; *Field* v. *Field*, 9 Wend., 394, 403 and cases cited; *Rex* v. *Varlo*, 1 Cowp., 248; 1 Kyd on Corps., 308, 400, 424; 1 Black. Com., 478 - Gibson, Ch. J., in *St. Mary's Church*, 7 Sergt. & Rawle, 543; Angel & Ames on Corp., 3d ed., ch. 14, pp. 452, 460, § 8, 8th ed., § 501; *Rex* v. *Bellringer*, 4 T. R., 810; argt., p. 817; opin., 822, 823; *Damon* v. *Granby*, 2 Pick R., 345, 355; *Wiggin* v. *Freewill Baptist Ch.*, 8 Met., 301, 312; *Stow* v. *Wyse*, 7 Conn. R., 214, 219; *Smyth* v. *Dailey*, 2 H. L. Cases, 803; *King* v. *Bower*, 1 Barn. & Cress., 492; *Rex* v. *Miller*, 6 T. R., 268; *Rex* v. *Morris*, 4 East, 17.)

Grover, J. The determination of this case, depends upon the validity of the deed executed by the plaintiff to the defend-

ant, purporting to convey, by the former to the latter, the title to the property, the possession of which is sought to be recovered by the plaintiff in this action. The property consists of five lots of land, situate upon Madison avenue and Thirty-first street, in the city of New York, upon which, at the time of the giving of the deed, there was situated a church edifice, which, prior thereto, had been occupied by the plaintiff for religious worship. The validity of the deed, depends upon the jurisdiction of the Supreme Court, to make the order, directing a conveyance of the property by the plaintiff to the defendant. If the court had jurisdiction to make that order, the defendant acquired title to the property in question, in fee, under the deed based thereon, given by the plaintiff to it. It is claimed, upon the part of the plaintiff, that the court acquired no jurisdiction of the subject-matter, and had no power to make the order, for the reason, that the petition of the trustees of the plaintiff, presented to the court for such order, was not authorized by a majority of its corporators, nor by the vote of a majority thereof, present at any meeting of such corporators, duly convened for the consideration of the subject. At the trial, the justice found that it was authorized, by the majority of such corporators, present at such a meeting. To this finding of fact, an exception was duly taken by the plaintiff. This exception raises in this court the question, whether there was any evidence given upon the trial, tending to prove such fact, and would require an examination of the evidence given for the purpose, if the fact was at all material to the rights of the parties; but, having come to the conclusion that it was not material, I shall not examine the evidence upon this point. It was proved that the petition to the court, and all the subsequent proceedings, down to and including the giving of the deed, were authorized and carried on by a majority of the trustees of the plaintiff. The fourth section of the act, to provide for the incorporation of religious societies (3 General Statutes, 689), among other things, authorizes and empowers the trustees, to take into their possession and custody all the temporalities belonging to the church, congregation or society,

whether consisting of real or personal estate, and by their corporate name, to sue and be sued in all courts of law or equity, and to recover, hold and enjoy property, real and personal, belonging to such church, congregation or society, as fully and amply, as if the right or title thereto had originally been vested in the said trustees, and to purchase and hold other real and personal estate, and to demise, lease and improve the same for the use of such church, congregation or society, etc. In short, the trustees are constituted the managing officers and agents of the corporation, in respect to all its temporalities; and the statute points out no mode for the doing of any corporate act, in respect to its property, except by its trustees. But it is claimed, by the counsel for the appellant, that by the true construction of section 11 of the act, the trustees had not the power, to initiate proceedings for the sale of the real estate of the corporation, as provided in said section, without the sanction and authority of a majority of the corporators. The language of the section bearing upon this question is, that it shall be lawful for the chancellor (Supreme Court), upon the application of any religious corporation, in case he shall deem it proper, to make an order for the sale of any real estate belonging to such corporation, etc. By or through whose agency the application of the corporation is to be made, the section is silent; and it provides no mode of showing, that the corporation have authorized the application, or for the preservation of any evidence of such authority. We have already seen, that section 4 of the act, makes the trustees the sole managers of the corporation, in respect of its temporalities; and the fair assumption is, that it was the intention to constitute them agents of the corporation, in respect to the acts required by the eleventh section, for making sale of its real estate. Had it been deemed necessary for the corporators to meet as such, and authorize, by a formal resolution, the sale of real estate, or do any other act to render the sale valid, provision would have been made for convening such meeting and recording such resolution or act, together with the deed of the purchaser, so as to furnish enduring evidence of all

facts essential to sustain the title of the purchaser. The absence of any such provision, furnishes a forcible argument, that no such meeting or resolution was intended by the legislature. The act (§§ 3, 7), among other things, in effect provides, that every male person of full age, who has been a stated attendant on divine worship in the church, congregation or society for one year, and who shall have contributed to the support of the church, congregation or society, according to the usages or customs thereof, shall be corporators. It could never have been the intention of the legislature, to make the title of a purchaser depend upon the question, whether a majority of those who approved of, or were opposed to, the sale, and to determine this question, as was attempted in this case, by parol proof of who were, in fact, corporators, and whether a majority so ascertained favored or opposed the sale. The true construction of the act, considered as a whole, is, that the trustees are the proper persons to act in behalf of the corporation, in the proceedings authorized by the eleventh section, and that their acts in this respect are binding upon the corporation. There was nothing determined in *Wyatt* v. *Benson* (23 Barb.), in opposition to these views. That was an action in equity, instituted by a majority of the corporators, against persons claiming to be the trustees of the corporation, to procure the revocation of an order obtained by such persons from the court, for the sale of the church property, and to enjoin them from proceeding to make such sale under and by virtue of such order. It is true that the learned judge, in his opinion states, that the trustees can execute no trust except such as is acceptable to the majority of the congregation; that the whole act shows that it was the intention of the legislature, to place the control of the temporal affairs of these societies in the hands of the majority of the corporators, independent of priest or bishop, presbytery, synod, or other ecclesiastical authority. A closer examination of the statute would, I think, have satisfied the judge, that such control is placed in the hands of those elected trustees by the corporators. But the judgment was not placed upon this ground. In another part

of the opinion, the judge states, that it might perhaps have been assumed, that the trustees did represent the views of the corporation in making the application, and that there was apparent authority for granting the consent of the court. The order is still in *fieri*, not having been executed; and no rights having been acquired under it, it is still under the control of the court, and it is therefore, competent for the court to revoke its consent to the sale; thus clearly showing, that in the opinion of the judge, an order for a sale, obtained upon the application of the trustees, without showing that a majority of the corporators concurred in such application, is apparently valid, and when executed the title of the purchaser will be upheld. Whether the remedy, in case the application of the trustees was against the wishes of the majority of the corporators, should not have been a motion to the special term, to vacate the order instead of an action in equity, is a question not necessary to consider in this case. In the matter of St. Ann's church (23 Howard, 285), it was expressly held, that no meeting of the corporators or any action by them was necessary, to authorize the trustees to make an application to the court, for the sale of the real estate of the corporation, but that the court acquired jurisdiction, upon the petition of the trustees in the absence of any action by the corporators. A like opinion was given by Mr. Justice Harris, in the matter of the second Baptist society in Canann (20 Howard, 324), although the point was not involved in the case. Those conversant with the disposition of these applications by the court, are aware that in some cases the petition contains a statement, that the application is made, pursuant to a resolution passed by a majority of the corporators, at a meeting held for the consideration of the subject; and in other cases no such recital is contained; and in neither case is proof taken nor any determination of the question, whether the application for the sale is approved by the majority of the corporators, unless opposition is made by some of the corporators to the sale prayed for. A judgment by this court, that the title of the purchaser could be defeated by proof, that there was no autho-

rity given by a meeting of the corporators to the trustees, or by proof that a majority were, in fact opposed to the sale, would be destructive to many titles acquired by purchasers in good faith at such sales, and create doubt and uncertainty as to all. In this case proof was offered by the plaintiff, that some statements of fact contained in the petition, tending to show the expediency of the conveyance from the plaintiff to the defendant were untrue. This was rightly excluded. If the court acquired jurisdiction of the subject-matter by the presentation of the petition, the order granted thereon was conclusive upon the plaintiff when acted upon, and the title of the defendant in the absence of fraud or collusion on its part (of which there was no pretence) was perfect. The only remaining question is, whether the transaction between the plaintiff and defendant, was a sale within the eleventh section of the act. If it was, the defendants established a complete title, and the judgment in their favor should be affirmed. The petition of the plaintiff's trustees in substance, stated that the plaintiff was the owner of the lots in question, and had erected a church edifice thereon, the whole costing $122,000; that their present indebtedness was $73,000; sixty-one of which was secured by mortgages upon the property; that from various causes stated in the petition, it was unable to pay its liabilities, or meet the current expenses of the church; that the plaintiff and defendant, a religious corporation under the laws of the State, located in Oliver street, and which for some time had contemplated disposing of its property and moving up town, had formed a plan and made arrangements for uniting the two churches upon the following terms; that the plaintiff should convey all its property to the defendant, and that the members of the Madison avenue Baptist church, were to become and be members of the Oliver street Baptist church; and, thereupon, the regular services of the united churches, were to be held in the house of worship then owned by the plaintiff; that the trustees of the defendant were to resign, and a new election of trustees had by the united church and congregation; that, thereupon,

the defendant was to take the corporate name of the plaintiff; that the real and personal property of both was to become liable for the indebtedness of both; an agreement for disposing of the pews in the edifice of the plaintiff, after the union was consummated; that the plan of union had been agreed to by both corporate bodies; that the defendant owned property over and above its indebtedness, of the value of from $50,000 to $65,000, which, upon the consummation of the union, would become applicable to the payment of the debts of the plaintiff, and that, by the union, the creditors of the plaintiff would obtain that amount of additional security for the payment of their debts; that the two churches had obtained subscriptions for about $15,000, to be applied to the payment of the floating indebtedness of each. Then follows a statement of the number of pew-owners and pew-hires concurring in the application, and that the others favor it, and that the rights of pew-owners and holders will be protected. Upon this petition the court based the order, for the conveyance of the property by the plaintiff to the defendant, in pursuance of which the deed was given. The stipulation executed by the trustees of the defendant to the plaintiff, at the time the deed was given, by which the defendant undertook to pay the debts of the plaintiff, does not affect the question, as it constituted no part of the contract for the conveyance, and was not referred to in the petition upon which the order was based. The inquiry is, whether the contemplated conveyance from the plaintiff to the defendant, upon the terms and consideration set out in the petition, would constitute a sale within the meaning of the eleventh section of the act. A sale, as defined by Blackstone (2 Com., 446), is a transmutation of property from one man to another, in consideration of some price or recompense in value; by Kent (2 Com., 468), as a contract for the transfer of property from one person to another for a valuable consideration; and, among the requisites to its validity, is mentioned the price paid or to be paid. Bouvier, in his Law Dictionary (vol. 2, p. 377), defines a sale, as an agreement by which one man gives a thing for a price in current money; that this

differs from a barter or exchange in this, that in the latter, the price, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. The term, as used in the statute, should be construed as defined by Blackstone and Kent. This would embrace every transfer for a valuable consideration, whether paid in cash or other property. In case payable in the latter, the property to be received should be specified in the petition, so as to enable the court to determine, whether the proposed contract is judicious on the part of the corporation. Tested by this construction, the arrangement set out in the petition, was in no sense a sale of the property by the plaintiff to the defendant. There was no price whatever to be paid therefor. The plaintiff, as a corporation, was to derive no possible benefit as a consideration for the conveyance. True, the members of the plaintiff's church were to be received into, and become members of, the defendant's church, and the plaintiff's corporators were to become corporators of the defendant. This may be regarded as a benefit conferred upon those classes as individuals, but can in no sense be so to the plaintiff, regarded as a corporation. Indeed, the arrangement could only be made effectual by the dissolution of the plaintiff; and this result it was the manifest purpose of the arrangement to effect. In *Wheaton* v. *Gates* (18 N. Y., 395), it was held by this court, that the trustees of a religious corporation, have no power to distribute its property among its individual members, or any class of them, and that an order for the sale of its real estate, obtained upon a petition showing such to be the purpose of the sale, was without jurisdiction and void, and that no title could be acquired by a purchaser, at a sale made in pursuance of such order. This necessarily determines, that the consideration for the sale must inure to the corporation making it, as such, and not to the corporators as individuals. Whether the consideration be pecuniary, or as in the present case, facilities for the enjoyment of religious worship, or of any other nature, can make no difference. The additional security to the creditors of the plaintiff under the arrangement, was not such a consideration

to the plaintiff as to constitute the transaction a sale, if, indeed, it was any consideration whatever. From the petition it appears, that these creditors were abundantly secure, and there is no intimation of any desire on their part for any additional security. The conveyance to the defendant, was not made upon a sale to it by the plaintiff, pursuant to the eleventh section of the act; and the title of the defendant cannot be sustained upon that ground. But it is insisted by the counsel for the defendant, that religious corporations had the same power at common-law of conveying their real estate as other corporations, which they still retain as regulated by the eleventh section of the act, requiring only the sanction of the court of the conveyance made. This is an important inquiry in the present case. If religious corporations, created under the act of 1784 (1 Greenleaf's Laws, ch. 18, p. 71), down to the adoption of the present eleventh section in 1806, possessed the power to alienate real estate, and the only restriction now existing arises from that section, it may well be, that any conveyance, made pursuant to an order of the court under section 11, would give a good title to the grantee. In the absence of any statute upon the subject, there can be no doubt that ecclesiastical corporations possessed this power. (*Mayor, etc.* v. *Lowten*, 1 Ves., & Bea., 244; *Dutch Church* v. *Mott*, 7 Paige, 78, and authorities cited; 2 Black Com., 319; 2 Kent's Com., 281.) But several statutes were passed in the reign of Elizabeth, expressly taking this power from charitable corporations. (2 Bl. Com., 320, 321.) The question is, whether these restraining statutes were introduced into the colony of New York, and became operative as part of the common-law of the colony. 2 Kent's Com., 281, says, we have not re-enacted in New York those disabling acts; but the better opinion upon the construction of the statute, for the incorporation of religious societies is, that no religious corporation can sell in fee any real estate without the chancellor's order. In *Bogardus* v. *The Trinity Church* (4 Paige, 178), the chancellor, speaking of the effect of English statutes upon the law of the State, says it is a natural presumption, and is,

therefore, adopted as a rule of law, that upon the settlement of a new territory by a colony from another country, especially when the colonists continue, subject to the same government, they carry with them the general laws of the mother country, which are applicable to the situation of the colonists in the new territory, which laws thus become the laws of the colony, until they are altered by common consent or legislative enactment. He further says, that the common-law of the mother country, as modified by positive enactments, together with the statute laws, which are in force at the time of the emigration of the colonists, become in fact, the common-law, rather than the common and statute law of the colony. In *De Ruyter* v. *The Trustees of St. Peter's Church* (3 Barb, Ch., 119), the chancellor says: Several statutes, however, were passed in the reign of Elizabeth, and one, in the first year of her successor, restraining alienations of church property by religious corporations, and restricting the power of leasing the same, for a longer period than twenty-one years, etc., and adds; these statutes, forming a part of the law of England, at the time of the settlement of this State by colonists from England under the charter of the duke of York, were probably brought hither by those emigrants, and became a part of the laws of the colony, although they were not afterwards re-enacted here. (See same case, 3 Comstock, 239; also, *The Canal Appraisers* v. *The People*, 17 Wend., 584.) The practice of religious corporations desiring to sell real estate, of resorting to the legislature for special acts authorizing such sales, prevailing prior to the enactment of the eleventh section of the present act, shows that it was understood, that these acts of Elizabeth had divested them of the power to alienate, without the consent of the sovereign authority. (Willards Equity pp. 734, 735.) The eleventh section was enacted, to obviate the necessity of such applications to the legislature, in cases of sales where, as we have seen, the consideration must inure to the benefit of the corporation as such. In cases where it is desirable for these corporations, to alienate real estate in any other way, or for any other purpose,

application should still be made to the legislature for the necessary authority. I have reluctantly arrived at the conclusion, that the court had no power to make the order for the conveyance in the present case; and that therefore, no title was thereby acquired by the defendant. The whole case shows, that the plan of union originated in good faith, was fairly and honorably negotiated and consummated, and so far as can be seen, was eminently calculated, to promote both the temporal and spiritual welfare of all concerned. But the security of the real estate of all religious corporations, requires a strict adherence to the statute. There is no danger to be apprehended from conveyances founded upon sales. In such cases the court can readily ascertain, whether the consideration is adequate, and the proposed investment judicious. Power over such transfers may safely be exercised by the court. This is all the legislature has delegated to the court. In all other cases application must be made to the legislature. No questions arise upon this appeal, as to the equitable rights of the defendant, arising out of the mortgages purchased by it, upon the property or debts of the plaintiff which it has paid. There is no finding of facts, enabling the court to consider these questions. The court at the trial held, that the defendant acquired title under the deed to it from the plaintiff's trustees. This was error. The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

All concur except Allen, J., not voting.

Judgment reversed.

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108 266
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HENRY WHITE et al., Executors, etc., v. WILLIAM J. HOWARD et al.

W. B., a resident of the State of Connecticut, died seized of real estate situate in that State and in New York, and leaving a last will and testament, which after providing for certain legacies, etc., gave all the residue of his estate, real and personal, to his executors, and the survivor of them, as joint tenants upon certain specified trusts. By another clause, he authorized said trustees to sell the real estate in Connecticut, and to invest the proceeds in real estate, loans, bonds and stocks located in the New England States or in the State of New York. — *Held*,

1st. The will gave the trustees no power to sell the real estate, of which the testator died seized, situate in New York.

2d. The power of sale, if any was conferred, is discretionary, and until exercised by an actual sale, did not effect a constructive or equitable conversion of the realty into personalty.

3d. The real estate situate in New York, both that of which the testator died seized and that purchased by the trustees, must be regarded as realty; and the validity of the testamentary disposition thereof, and the rights of those claiming it by descent, must be determined by the laws of this State.

A devise to an unincorporated charitable association is void, and is not made valid by the incorporation of such association after the death of the testator.

So, also, a subsequent amendment of its charter, imparts no vitality to a devise to a corporation, not authorized to take at the time of such death.

The trusts in the will of W. B., so far as material, were, in substance, to apply the rents, issues and profits of the trust fund to and for the use and benefit of F. H. B., daughter and only child of testator; and in case she died without issue, to pay certain legacies, and to divide the residue equally between six societies and corporations, four of which were incapable of taking by devise. F. H. B. survived the testator, and died without issue. — *Held*, that a contingent remainder, in four-sixths of the real estate, was undisposed of by the will, which upon the death of the testator, passed to his heirs; that F. H. B., as sole heir, became seized of this remainder, and upon her death, it went to her heirs.

(Argued February 7, 1871; decided September 2, 1871.)

APPEALS from judgment of the late General Term of the first judicial district, affirming judgment entered upon the decision of the court at Special Term, giving construction to the will of William Bostwick, as hereinafter stated.

Statement of case.

William Bostwick, a widower, whose residence and domicil were at New Haven, in the State of Connecticut, died there, April 10, 1863, leaving a will, dated May 23, 1860, to which were attached two codicils, dated, respectively, April 1, 1861, and August 16, 1862.

There survived him one child, a daughter, Frances Howard Bostwick, his only heir-at-law and next of kin. She died August 30, 1865, at the age of sixteen years, unmarried, intestate, and without issue. Her only heirs-at-law were, and are, William J. Howard, Emeline F. Thomas, and Mary Ann M. Cocke.

The testator left property, real and personal, in Connecticut and New York, and his executors, under and pursuant to the provisions of his will, both during the lifetime and after the death of his daughter, made further investments of moneys of his estate, in the purchase and improvement of lands in the city of New York.

The said will was proved, as a will of real and personal estate, at the city of New York, on the 18th day of May, 1863; at the city of New Haven, on the sixth day of June, in the same year. Letters testamentary thereupon issued, in both jurisdictions, to the plaintiffs, Henry White and John P. Crosby, who alone duly qualified, and who are sole acting executors of the said will.

After providing for the payment of his debts and funeral expenses, and certain pecuniary bequests, the testator, by the "seventh" article of his will, devised and bequeathed all the residue of his estate, both real and personal, to Henry White, John P. Crosby, and Pelatiah Perit, and the survivors and survivor of them, as joint tenants, in fee simple, upon trust, to receive the rents, income and profits thereof, and during the minority of his daughter, to pay over to her guardian so much of the net proceeds of said rents, income, etc., as should be proper and necessary for her support, maintenance and education; and, after the arrival of his daughter at the age of twenty-one years, to pay over to her, during her natural life, if she desired it, the whole of such net proceeds; or if

she preferred, only such portion thereof as she might desire; and the balance, not paid over to her, to invest (as prescribed by the will); such investment to be added to and form a part of the principal of said trust fund or property.

Then follow various directions, as to the contingent disposition of such trust fund or property, upon the death of the daughter; one of the contingencies occurred, in the death of the daughter, *unmarried, intestate, and without issue*, for which express provision was thus made.

The last clause of the "seventh" article is as follows:

"But if my said child Frances die with no husband, or child, or issue of any child, surviving her, then the whole of said trust fund or property shall be disposed of as follows, namely: $2,000 to the New Haven orphan asylum; $5,000 to the American Sunday School Union in Philadelphia; $5,000 to the society for the promotion of collegiate and theological education at the west; $10,000 to the American Bible Society in New York; and then, whatever remains of said trust fund or property shall be divided equally between the following six societies, namely; The American Tract Society, in New York; the Southern Aid Society; the American and Foreign Christian Union; the American Colonization Society; the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America; the Board of Foreign Missions of the Presbyterian Church in the United States of America."

The will contained a further provision, to the effect that the estate thereby given to any unincorporated society should be conveyed, transferred and paid, in fee simple and forever, to the person who should act as treasurer of such society, to be appropriated to its charitable uses, and under its direction.

"The American Tract Society" is a corporation, chartered by the legislature of the State of New York, May 26, 1841. The original act of incorporation conferred no authority on the Society to take or hold land by devise; but by an amendment of the said act, passed March 31, 1866, it was declared capable of so taking real estate.

"The Southern Aid Society," at the time of the death of the testator, and at the time of the death of his daughter, and until the time of its incorporation, hereinafter mentioned, was a voluntary charitable association of individuals, not incorporated. It was organized as a corporation under the general law of this State for the formation of benevolent, charitable, scientific and missionary societies, November 7, 1866.

"The American and Foreign Christian Union" was organized as a corporation in 1861, under the same general law.

"The American Colonization Society" is a corporation chartered by the legislature of the State of Maryland, in 1836, and is authorized by its charter to take, in fee or otherwise, any lands, etc., by the gift, bargain, sale, devise, or other act of any person.

"The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America" is, and was, organized as a corporation in 1841, under the statutes of the State of Pennsylvania, with the right to purchase and receive, take and hold lands and all kinds of estates which might be devised, bequeathed or given to them. The original corporate name did not contain the word "domestic;" but, by act of 30th January, 1857, the legislature of the said State changed its corporate name by inserting that word.

In 1866, the legislature of said State authorized the said corporation, to hold and convey real and personal estate, whose income should not exceed $30,000.

"The Board of Foreign Missions of the Presbyterian Church in the United States of America" was organized as a corporation in 1852, under the general law aforesaid of the State of New York, for the incorporation of benevolent, charitable, scientific and missionary societies. By act of the legislature of said State, passed April 12, 1862, the said corporation was declared capable, of taking by devise any real or personal estate for the purposes of said corporation.

Charles A. Kirtland and others, defendants, would have

been the heirs-at-law of the testator, if he had died without issue; and, upon the death of his daughter, they were his nearest living relatives.

This action was brought in the Supreme Court by the plaintiffs' sole acting executors, as aforesaid, to determine the validity and true construction of the said will and its various provisions.

It was tried at Special Term by Hon. JOSIAH SUTHERLAND, Justice, February 20th, 1867, who held and decided:

1. That the validity of the disposition of the personal property of the testator, and the succession to it, under his will or otherwise, must be declared by the courts of Connecticut.

2. That the "American and Foreign Christian Union" and "The Board of Foreign Missions of the Presbyterian Church in the United States of America" can take by devise, and under the will of the testator, are respectively entitled to, and seized of one-sixth part of the said real estate in the city of New York, whether acquired by or through the said investments by the said executors or otherwise.

3. That the defendants, Howard, Thomas, and Cocke, as the only heirs-at-law of Frances Howard Bostwick, deceased, succeeded to and are entitled to the remaining four-sixths of the said real estate in New York, except so far as the same was, by the said justice, adjudged to be personal property in the hands of the said executors.

4. That "The American Tract Society," "The Southern Aid Society," "The American Colonization Society," and "The Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America," cannot take under the will, and are not entitled to any part of said real estate in the city of New York.

5. That the defendants, Charles A. Kirkland and others (standing in the relation of heirs-at-law to the testator, if his daughter be excluded as such), are not, nor is either of them, entitled to any part of the testator's real estate in New York.

Judgment was rendered accordingly February 1st, 1869.

The four excluded societies, viz., The American Tract Society, The Southern Aid Society, The American Colonization Society, and the Trustees of the Board of Domestic Missions, etc., etc., appealed from so much of the original judgment as excluded them.

The defendants, Charles A. Kirtland and others (standing in the same relation), appealed from the whole of such judgment.

The judgment was affirmed by the General Term, November 2d, 1870. Judgment of affirmance perfected December 14th, 1870. Such societies and said defendants, Kirtland and others, appealed from the judgment of affirmance.

J. P. Crosby, for plaintiffs. The corporate bodies named as residuary trustees, may take the devises as real estate. It is for the people alone, to interdict their holding beyond the amount limited by their charter. (*Bogardus* v. *Tr. Church*, 4 Sand. S. C. Rep., 758; *Andrews* v. *N. Y. Bible and C. P. B. Soc.*, 4 Seldon, note, 563, specially at p. 563; *Vernon* v. *Hills*, 6 Cowen R., 26; also, *Runyan* v. *Coster's Lessee*, 14 Peters R., 131; *Leasure* v. *Hilegas*, 7 Serg. & Rawle., 313.) The comity of international law recognizes foreign corporations. There is no analogy to the strictly local laws governing descent. (*The Silver Lake Bank* v. *North*, 4 John. Ch. Cas., 373; *The Floating Dock Co.* v. *New Jersey Oil Co.*, 3 Duer R., 648; *Mumford* v. *Amer. Life Ins. and Tr. Co.*, p. 482, 4 Comstock R., 463; *Bard* v. *Poole*, 2 Kernan, p. 502; Westlake Inter. Law, § 224; 98 Law Lib., 136, [209], adopting the language of Judge DENIO, of New York.)

P. F. Sanford, for defendants, Howard and others, heirs of Frances Howard Bostwick. The succession to the real estate in New York, must be determined by the laws of New York. (*Hosford* v. *Nichols*, 1 Paige, 226; *Holmes* v. *Remsen*, 4 J. Ch. R., 462.) The American Tract Society and the Southern Aid Society, authorized to take by

devise at testator's death, were not aided by acts of 1866. (2 R. S., 57, § 3; *Owens* v. *The Missionary Society*, 14 N. Y., 384; *Downing* v. *Marshall*, 23 N. Y., 283; Laws of 1841, chap. 266, p. 249; Laws of 1866, chap. 310, p. 670.) The clause directing the share of unincorporated societies to be paid to the treasurer, does not impart validity to the devise. (*Leonard* v. *Burr*, 18 N. Y., 107; *Bascom* v. *Albertson*, 34 N. Y., 584.) Foreign corporations not expressly authorized by any statute of this State, cannot take. (*Sherwood* v. *American Bible Society*, 1 Keys, 561; *American Bible Society* v. *Marshall*, 15 Ohio, 537.) The corporations capable of taking, not entitled to whole residue. (*Downing* v. *Marshall*, 23 N. Y., 375; *Van Kleeck* v. *Dutch Church*, 20 Wend., 457.) The testator's daughter took by descent, that portion of the estate not disposed of by the will. (*Van Kleeck* v. *Dutch Church*, 20 Wend., 457; *Van Cortland* v. *Kipp*, 1 Hill, 590.) Under section 62 the reversion vested immediately in the heir-at-law. The legal effect (*so as to constitute such heir-at-law the stock of descent*) is the same, though his own life were the subject of, or determined the duration of the trust estate. (*Anthony* v. *Brower*, 31 How. Pr. R., 129; affirmed, 37 N, Y., 549; *sub nomine Gill* v. *Brower*; *Hoes* v. *Van Hoesen*, 3 B. C., 379, 396.) A legacy may be given, payable after death of legatee, and such legacy vests on the testator's death. (*Sweet* v. *Chase*, 2 Coms., 73; *Terrell* v. *Public Ad.*, 4 Bradf., 545, and cases cited.)

E. G. Black, for defendant, Henry D. White administrator of Frances Howard Bostwick. The law of place of testator's domicil governs as to construction, and succession of personal property bequeathed. (Redfield on Wills, part I, ch. 9., § 2, *et seq.*; *Crispin* v. *Doglioni*, 9 Jur. N. S., 653; *Stanley* v. *Bernes*, 3 Hagg, Ecc., 373; *Douglas* v. *Cooper*, 3 My. & K., 378; *Desesbats* v. *Besquier*, 1 Binn., 336; *Parsons* v. *Lyman*, 20 N. Y., 103; *Moultrie* v. *Hunt*, 23 N. Y., 394; Story on Conflict of Laws, § 468.) The child follows the domicil of its father. (*Upton* v. *Northbridge*, 15 Mass.

R., 239; *Hebron* v. *Marlborough*, 2 Conn. R., 18; *Somerville* v. *Somerville*, 5 Vesey, 750.) And whether such father be living or dead. (*Oxford* v. *Bethany*, 19 Conn. R., 229.) Even the mother could not change the domicil of the minor child. (Denesart Domicil, § 2; case of the Compte de Choiseul; Phillimore on Domicil, ch. 7, § 92.) Certainly not, if the rights of succession to the personal estate could be thereby altered. (*Brown* v. *Lynch*, 2 Brad., 214; *Ex parte* Bartlett, 4 Brad., 221.) Or if there were any suspicion of fraud. (*Pottinger* v. *Wrightman*, 3 Merivale, 67; Story on Conflict of Laws, § 505 c; Phillimore on Domicil, ch. 7, § 60. The domicil of the guardian is not the domicil of the ward. (*Salisbury* v. *Raymond*, 1 Root, 131; *Ex parte* Bartlett, 4 Brad., 221; Pothier, introductory chapter to the Custom of Orleans; Story on Conflict of Laws, § 505 c. and 506; *School Directors* v. *James*, 2 Watts & Sergt., 568; Boullenois Dessert. Ques. 2, p. 53; Story on Conflict of Laws, § 505 c. and § 506, note.) Residence for tuition works no change. (*Inhabitants of Granby* v. *Inhabitants of Amherst*, 7 Mass., 1.) Letters of administration granted here, merely ancillary to foreign administration. (*Cumming* v. *Banks*, 2 Barb., 602; *Churchill* v. *Prescott*, 3 Bradf., 233; *Parsons* v. *Lyman*, 20 N. Y., 103.)

J. H. Reynolds & *G. C. Genet*, for Kirtland, et al. heirs of testator. No intended equitable conversion of the real estate in New York into money. (*Harris* v. *Clark*, 7 N. Y., 249, 260, 261; *Stagg* v. *Jackson*, 1 Comstock, 211, 212; *Martin* v. *Sherman*, 2 Sand. Ch. R., 341; *Allen* v. *Dewitt*, 3 Comst., 282, etc.; *Lovett Ex'rs* v. *Gillender*, 35 N. Y., 617; Law of Trusts, by Tiff. & Ballard, 79; *Polley* v. *Seymour*, 2 You. & Col., 80; *Gott* v. *Cook*, 7 Paige, 534; Jarman on Wills, chap. 20, p. 477, note.) Questions concerning title and disposition of the real estate in New York, must be disposed of by the courts alone of this State. (*Hosford* v. *Nichols*, 1 Paige, 226; *Nicholson* v. *Leavitt*, 4 Sand., 276; *Andrews* v. *Herriott*, 4 Cowen, 508, 527, note; *Cutter* v. *Davenport*, 1 Pick.,

81; *Holmes* v. *Remsen*, 4 John. Ch. R., 462; Story's Conflict of Laws, § 424, and cases in note, § 428, and cases under p. 702, § 445.) The moneys invested by executors in real estate ceased to be personality. (*Polley* v. *Seymour*, 2 You. & Coll., 722; *Brown* v. *Begg*, 7 Vesey, 286.) The American Tract Society cannot take by devise. (*Downing* v. *Marshall*, 23 N. Y., 383.) The foreign corporations cannot so take. (*Rose* v. *Rose Association*, 28 N. Y., 184; *Bank of Augusta* v. *Earle*, 13 Peters U. S. R., 519; *Runyon* v. *Costar*, 14 Peters U. S. R., 122; *Railroad Co.* v. *Kneeland*, 4 Howard, 16; *Boyce* v. *City of St. Louis*, 29 Barb., 655; *Rose* v. *Rose*, 28 N. Y. R., 184.) They have no corporate existence beyond the limits of the State creating them. (Angel and Ames on Corporations, §§ 161, 104; *Dey* v. *Newark India Rubber Co.*, 1 Blach. C. C. R., 628.) Only allowed to transact business not contrary to known policy of State. (*Mumford* v. *American Life Ins. Co.*, 4 N. Y., 482; *Stoney* v. *American Life Ins. and Trust Co.*, 11 Paige, 635.) That portion of residue as to which disposition fails, does not go to other residuary legatees. (*Beekman* v. *The People*, 27 Barb., 281, 282; Same case, 23 N. Y., 312; *Downing* v. *Marshall*, 23 N. Y., 366; *Atty.-Gen.* v. *Davis*, 9 Vesey, 535; *Cheslyn* v. *Cresswell*, 2 Eden, 123; *Archroyd* v. *Smithson*, 1 Brown's Ch. R., 503.) Trusts to unincorporated societies void. (*Bascom* v. *Albertson*, 34 N. Y., 584; *Downing* v. *Marshall*, 23 N. Y., 382; *Yates* v. *Yates*, 9 Barb., 343; *Owens* v. *Miss. So.*, 14 N. Y., 406; *Beekman* v. *The People*, 23 N. Y., 312; *McCaughal* v. *Ryan*, 27 Barb., 395, 398, 409.) Trust for life of Frances H. Bostwick valid, and during its continuance whole estate vested in the trustees. (1 R. S., 729, § 60; *Leggett* v. *Perkins*, 2 Comst., 297; *Amory* v. *Lord*, 5 Selden, 411; *Leggett* v. *Hunter*, 19 N. Y. R., 454; *Stacey* v. *Rice*, 27 Pa., 75; Barratt's Appeal, 46 Pa., 399; *Cleveland* v. *Hallett*, 6 Cush., 407.) The fee did not vest in her. (4 Kent's Com., 216; *Walter* v. *Mulligan*, 45 Pa., 179, 180; *Noyes* v. *Blakeman*, 2 Seld., 578; *Gilman* v. *Redington*, 27 N. Y. R., 15; *Tobias* v. *Ketchum*, 32 N. Y. R.. 330; *Brewster* v.

Striker, 2 Comst., 19; *Striker* v. *Mott*, 28 N. Y., 91; *Rieben* v. *White*, 28 How. Pr. R., 320; *Theo. Sem. of Aub.* v. *Kellogg*, 16 N. Y. R., 93; *McLean* v. *McDonald*, 2 Barb., 534; *Judson* v. *Gibbons*, 5 Wend., 224; *Vale* v. *Vale*, 4 Paige, 317; *Bradley* v. *Amidon*, 10 Paige, 235.) The reversion did not vest until the termination of this estate by her death. (45 Pa., 179, 180; *Boynton* v. *Hoyt*, 1 Denio, 57; *Harris* v. *Clark*, 3 Seld., 259; *Savage* v. *Burnham*, 17 N. Y., 574; *Everitt* v. *Everitt*, 29 N. Y., 71; *De Barrante* v. *Gott*, 6 Barb., 493.) If the fee vested in F. H. B., it would have destroyed all other estates. (4 Kent's Com., 99, 100; 3 Preston on Contr., 182, 261; *Taylor* v. *Gould*, 10 Barb., 401; 2 Wash on Real Prop., p. 394 §§ 13, 14.) No ultimate estate remains in grantor of fee. (*Van Rensselaer* v. *Dennisson*, 35 N. Y., 399; *Van Rensselaer* v. *Barringer*, 39 N. Y., 9; *Briggs* v. *Davis*, 21 N. Y. R., 576.) This was a valid contingent remainder. (*Striker* v. *Mott*, 28 N. Y. R., 82; 1 R. S., 722, §§ 13, 28.) While contingents remainder outstanding, the fee does not vest. (*Wendell* v. *Crandall*, 1 N. Y., 401; Same case, 1 Denio, 9; *Edwards* v. *Varrick*, 5 Denio, 668; *Moore* v. *Little*, 40 Barb., 488; *Tyson* v. *Blake*, 22 N. Y., 563; *Norris* v. *Beyea*, 13 N. Y., 272, 286; *Sheridan* v. *House*, 4 Keyes, 569; *Campbell* v. *Raurdon*, 18 N. Y., 415; *Roberson* v. *Wilson*, 38 N. H., 48; *Taylor* v. *Gould*, 10 Barb., 388; *Olney* v. *Hall*, 21 Pick, 311; *Snow* v. *Snow*, 49 Maine R., 159; *Hibbard* v. *Rawson*, 4 Gray, 242; *Brown* v. *Lawrence*, 3 Cush. Mass., 390; *Leonard* v. *Burr*, 18 N. Y., 107.) The testator disposed of whole estate and his heirs took nothing. (*Hawkins* v. *Chappell*, 1 Atk., 622; *Gibson* v. *Roger Ambler*, 94–96; *Hill* v. *Bishop of London*, 1 Atk., 620; *Briggs* v. *Davis*, 21 N. Y., 576.) Where trustees have fulfilled all trusts capable of being fulfilled, a reversion or resulting trust arises in favor of testator's heirs. (*Cox* v. *Parker*, 22 Beavan's R., 168; *Burgess* v. *Wheat*. 1 Eden, 177; *Powell* v. *Merrett*, 22 L. J. C., 408; *Bishop* v. *Curtis*, 17 Jurist, 23; 4 Kent's Com., 425.) The gifts over, show testator did not intend the estate should descend to his

daughters. (*Smith* v. *Bell*, 6 Peters, U. S. R., 68; *Anderson* v. *Jackson*, 16 John. R., 399.)

H. C. Van Vorst, for defendants R. G. Beardslee and others, heirs-at-law of the testator (if daughter is excluded). The trustees under the will were vested with title to real estate in New York. (R. S., 5th ed., vol. 3, p. 16, § 55, sub. 3; *McLean* v. *McDonald*, 2 Barb., 934; *Irving* v. *De Kay*, 9 Paige, 621, affirmed 5 Denio, 646.) The person for whose benefit the trust is created takes no estate or interest in the lands. (R. S., vol. 3, p. 21, § 79; *Noyes* v. *Blakeman and others*, 2 Seld., 567; *Boynton* v. *Hoyt*, 1 Denio, 53; *Hawley* v. *James*, 16 Wend., 61.) There was a clear devise of the rents and profits of the lands, and such is a devise of the land itself. (*Bradley* v. *Amidon*, 10 Paige, 235; 4 Kent's Com., 526; *Craig* v. *Craig*, 3 Barb. Ch., 77; *Vail* v. *Vail*, 4 Paige, 317.) Where the purposes of the trust ceased, the estate vested in heirs-at-law of testator. (*Parks* v. *Parks*, 9 Paige, 107.) The heirs so to take, are those who are heirs at the termination of the trusts. (*Nicoll* v. *Walworth*, 4 Denio, 385; *Sterncher* v. *Dickinson*, 9 Barb., 506; *Bellinger* v. *Shafer*, 2 Sandf. Ch., 293; R. S., 5th ed., vol. 3, p. 12, § 29.)

A. S. Edwards, for the Southern Aid Society. If estate is distributed as personalty, the law of Connecticut will govern, and the intent of the testator be carried out. (*Am. Bible Soc.* v. *Wetmore*, 17 Conn., 182; *Treat's Appeal*, 30 id., 113.) To carry will into effect, land will be regarded as converted into personalty. (*The Phelps Will Case*, 28 Barb., 121, 146; S. C., affirmed 23 N. Y., 69, 76.)

G. N. Titus, for the American Tract Society and the American Colonization Society. Foreign corporations can take by bequest. (*Sherwood* v. *Am. Bible Soc.*. 1 Keyes, 561; *Williams* v. *Williams*, 4 Seld., 530; *McDonough* v. *Murdock*, 15 How. U. S., 367; *Brewster, etc.*, v. *McCall's Devisees*, 15 Conn., 274; *Burbank* v. *Whitney*, 24 Pick., 146.) All the

corporations are entitled to that portion adjudged to be personalty. (*Moses* v. *Murgatroyd*, 1 Johns. Ch., 119; *Shepherd* v. *McEvers*, 4 id., 136.) The contingent interests of the residuary legatees, vested in rights at death of testator. (Williams on Executors, 2 Am. ed., 638, 868; *Matter of Trustees of N. Y. P. E. Pub. School*, 31 N. Y., 589.) To them the executors are accountable for the personal property, in whatever form invested. (Williams on Executors, 11, 76; *Shotwell's Ex'rs* v. *Mott*, 2 Sandf. Ch., 57; 1 Story's Eq., §§ 477, 483–485, 505, 674; *Averill* v. *Locke*, 6 Barb., 120.) There was no equitable conversion of the personalty into lands. (1 Jarman on Wills, 4th Am. ed., 483, note 1; *Harris* v. *Clark*, 3 Seld., 242, 261; 2 Story's Eq. Jur., § 1214.) The statute of 1813 excepted corporations as competent devisees, without prohibiting them from taking by devise for a charitable use. (2 Kent's Com., 285, 286; *Theo. Sem. of Auburn* v. *Childs*, 4 Paige, 474; 9 Cow., 451; *Thompson* v. *Troope*, 24 Penn., 474.) The statute of 1830 leaves corporations, to whom express power to take by devise has not been given, in the same condition as if that statute had not been passed; but it does not prohibit them from taking by devise for a charitable use. (*Wright* v. *Trustees M. E. Ch.*, 1 Hoff. Ch., 230.) The words, "expressly authorized by its charter to take by devise," means only that "corporations, as such, cannot take in that manner, as they can by purchase, for the purposes of their organization." (23 N. Y., 388.) It does not require authority under a statute of this State. A forced construction will not be adopted to extend operation of a statute. (*Waller* v. *Harris*, 20 Wend., 561; Dwarr. on Stat., 703.) A foreign corporation can take by purchase, mortgage or devise, when consistent with its charter, and not prohibited by positive law. (2 Kent's Com., 283, note *b*; *Silver Lake Bank* v. *North*, 4 Johns. Ch., 370; *Lathrop* v. *Com. Bank of Sciota*, 8 Dana, 126; *Bard* v. *Poole*, 2 Kern., 495, 505; *Runyon* v. *Coster's Lessees*, 14 Pet., 129; *Mumford* v. *Am. Life Ins. and Trust Co.*, 4 Comst., 464; *Bartlett* v. *Nye and others*, 4 Metc., 378; *Burbank* v. *Whitney*, 24 Pick., 146.) The exercise of this

power has not been prohibited by positive law of this State. (*Att'y-Gen.* v. *Stewart*, 2 Mer., 143, 161; 1 Bl. Com., 108; *Lathrop* v. *Com. Bank of S.*, 8 Dana, 126; 2 Kent's Com., 282, 283; 9 Cow., 452; *Williams* v. *Williams*, 5 Seld., 546; 1 Hoff. Ch., 239.) The law of international comity demands, that this Maryland corporation should be permitted to take the land devised to it. (*Bank of Augusta* v. *Earle*, 13 Pet. U. S., 520, 588, 591; Angell & Ames on Corp., 161; *Silver Lake Bank* v. *North*, 4 Johns. Ch., 370; *Bard* v. *Poole*, 12 N. Y. [2 Kern.], 495; *Merrick* v. *Van Santvoord*, 34 N. Y., 208; *Mumford* v. *American Life Insurance Co.*, 4 Comst., 482; *Runyon* v. *Coster*, 4 Pet., 22; *Merrick* v. *Van Santvoord*, 34 N. Y., 216.) It is a person, within the meaning of the statute of wills, capable by law of holding real estate. (*U. S.* v. *Amedy*, 11 Wheat., 392; *Louisville R. R. Co.* v. *Letson*, 2 How. U. S., 558; *Covington Drawbridge Co.* v. *Shepherd*, 20 id., 232; 1 R. S., 719, §§ 8, 10.) It has express authority, by its charter, to take lands by devise in any part of the United States; and, under its charter, it may take here by devise, as a domestic corporation might or could, under a like charter from this State. (*Runyon* v. *Coster*, 14 Pet. U. S., 122; *Silver Lake Bank* v. *North*, 4 Johns. Ch., 373; *Bard* v. *Poole*, 12 N. Y., 495; *Merrick* v. *Van Santvoord*, 34 id., 208; *Thompson* v. *Troope*, 24 Penn. St., 474.) The residuary gift is not invalidated, by the laws of this State relating to accumulations of personal property, uses and trusts, or perpetuities. (*Shotwell's Ex'rs* v. *Mott*, 2 Sandf. Ch., 46; *Potter* v. *Chapin*, 6 Paige, 649; *Dutch Ch., etc.*, v. *Mott*, 7 id., 77; *Banks* v. *Phelan*, 4 Barb., 89; *Sherwood* v. *Am. Bible Soc.*, 1 Keyes, 561; *Williams* v. *Williams*, 4 Seld., 558.) The gift was made to a trustee, competent to take and hold for the charitable use and purpose indicated in its charter, and is valid. (*Trustees of Philips Acad.* v. *King*, 12 Mass., 546; *Burbank* v. *Whitney*, 24 Pick., 146; *Bartlett* v. *Nye*, 4 Metc., 378; *Vedal* v. *Gerard*, 2 How. U. S., 187; *Ex'rs of Burr* v. *Smith*, 7 Vt., 241; 1 Keyes, 561; Hill on Trustees, 3 Am. ed., 191, note 1.) The doctrine of equitable conversion applies, and

the land owned by testator at death should be regarded as personal property. (*Phelps* v. *Phelps*, 28 Barb., 121; *Phelps' Ex'r* v. *Pond*, 23 N. Y., 69; *Mower* v. *Orr*, 7 Hare, 473; *Grievson* v. *Kirsopp*, 2 Keen, 653.) If sale is necessary to execute trust, authority to sell will be presumed. (2 Spence Eq. Jur., 366; Hill on Trustees, 471; *Winston* v. *Jones*, 6 Ala., N. S., 550; *Meakings* v. *Cromwell*, 1 Seld., 136.) The devise to the American Tract Society was valid to divest title of the heir. (*Inglis* v. *Trustees, etc.*, 3 Pet., 99.) The title of the society was only defeasible on action by the State. (*Runyon* v. *Costar's Lessee*, 14 Pet., 122.) Under the act of 1866, it acquired full title. (*Curtis* v. *Leavitt*, 15 N. Y., 85, 152, 254; *Central Bank* v. *Empire Stone Dressing Co.*, 20 Barb., 24; *Washburn* v. *Franklin*, 35 id., 599; *Fort Plain Bridge Co.* v. *Smith*, 30 N. Y., 61.)

J. Westervelt, for the Trustees of the Board of Domestic Missions. Defendant is a corporation duly organized under laws of Pennsylvania, with authority to take by devise. (Statutes of Pa., vol. 3, ed. of 1810, ch. 1536; vol. 5, ch. 3065.) It has capacity to take in this estate. (*Sherwood* v. *Am. Bible Soc.*, 1 Keyes, 561; *Bank of Augusta* v. *Earle*, 13 Peters U. S., 520, 588, 591; Angell & Ames on Corporations, 161; *Silver Lake Bank* v. *North*, 4 Johns. Ch., 373; *Bard* v. *Poole*, 11 N. Y., 2 Kern., 495; *Merrick* v. *Van Santvoord*, 34 N. Y., 208; *Mumford* v. *Am. Life Ins. Co.*, 4 Comst., 482; *Runyon* v. *Coster*, 14 Peters U. S., p. 122; *Silver Lake Bank* v. *North*, 4 Johns. Ch., 373; *Bard* v. *Poole*, 12 N. Y., 495; *Merrick* v. *Van Santvoord*, 34 N. Y., 208; *Thompson* v. *Troope*, 24 Penn. State R., 474; *Williams* v. *Williams*, 4 Seld., 525, 554; *Owens* v. *Miss. Soc.*, 4 Kern., 380, 405; *Leonard* v. *Burr*, 18 N. Y., 107; *Beekman* v. *Bonsor*, 23 N. Y., 298, 310; *Downing* v. *Marshall*, 23 N. Y., 366; *P. E. Pub. School*, 31 N. Y., 574.) The question as to limitation in charter cannot be raised collaterally, only by proceedings taken by State. (Angell & Ames on Corporations, § 777, and cases in note; *Bogardus* v. *Trinity Church*, 4

Sandf. Ch. R., 758; *Harpending* v. *Dutch Church*, 16 Peters U. S., 492, 493; *Vernon Society* v. *Hills*, 6 Cow., 23; *Humbert* v. *Trinity Church*, 24 Wend., 630; *People* v. *Mauran*, 6 Denio, 401; *Runyon* v. *Coster*, 14 Peters U. S., 122.)

J. Westervelt, for the Board of Foreign Missions. A corporation may exist and have power under several distinct charters. (*U. S. Bank* v. *Dandridge*, 12 Wheat., 71; Angell & Ames on Corporations, § 85; *Rex* v. *Cambridge*, 3 Burr, 1656, 1661.)

J. W. Edmonds, for the American and Foreign Christian Union. The whole residue goes to the two societies (authorized to take) as joint tenants. (2 Kent's Com., 350; *Campbell* v. *Campbell*, 4 Bro. R., 15; Preston on Legacies, 239; *Shore* v. *Billingsley*, 1 Vern., 482; *Whitmore* v. *Trelawney*, 6 Ves., 129; *Ryder* v. *Sweet*, 2 Amb., 175; *Ryder* v. *Ryder*, 2 P. W., 331; *Campbell* v. *Campbell*, 4 Bro. C. C., 17; *Blinkhorn* v. *Feart*, 2 Ves. S., 8, 30; *Boysell* v. *Dry*, 1 P. W., 700; *Jackson* v. *Jackson*, 9 Ves., 597; *Barton* v. *Stokely*, 1 Vern., 482; *Craig* v. *Willis*, 2 P. W., 529; *Willing* v. *Baine*, 3 P. W., 114; *Page* v. *Page*, 2 P. W., 488; *Trevor* v. *Relf*, 2 Bro. C. C., 219; *Stuart* v. *Bruce*, 3 Ves., 633; *Morley* v. *Bird*, 3 Ves., 629; *Crooke* v. *De Vandes*, 9 Ves., 204; *Humphrey* v. *Taylor*, 2 Ves., 648; *Dorset* v. *Sweet*, Amb., 175; *Delmare* v. *Rebelle*, 1 Ves. Jr., 415; *Perry* v. *Clay*, 2 Bro. C. C., 187; *Baffar* v. *Bradford*, 2 Atk., 221; *Armstrong* v. *Eldredge*, 3 Bro. C. C., 216; *Scott* v. *Bargeman*, 2 P. W., 68; *Webster* v. *Webster*, 2 P. W., 347; *Baluzuer* v. *Johnson*, 3 Bro. C. C., 457; *Crooke* v. *De Vandes*, 9 Ves., 204, 11 Ves., 330; *Butler* v. *Stratton*, 3 Bro. C. C., 863; *Blacker* v. *Webb*, 2 P. W., 385; *Phillips* v. *Garth*, 3 Bro. C. C., 68; *Gardner* v. *Printess*, 2 Barb., 89; *King* v. *Strong*, 9 Paige, 94; *Banks* v. *Phelan*, 4 Barb., 80.) The intent of the testator must be carried into effect. (*Van Kleek* v. *Dutch Church*, 20 Wend., 472; *Tucker* v. *Tucker*, 5 N. Y., 419; *Rathbun* v. *Dyckman*, 3 Paige, 27;

Earl v. *Green*, 1 Johns., Ch. R., 494; *Bowers* v. *Smith*, 10 Paige, 196; *Parks* v. *Parks*, 9 Paige, 120; 4 Kent's Com., part 6th, ch. 68, 534, 654; 1 Redfield on Wills, 432, § 17; *Jackson* v. *Merrill*, 6 Johns., 185; *Jackson* v. *Babcock*, 12 Johns., 389.) The devise to the four societies is void. (1 Jar. on Wills, 3 Am. ed., 293, 305; *Jackson* v. *Staats*, 11 Johns., 337; *Jackson* v. *Merrill*, 6 Johns., 185.) And the residuum goes, not to the heirs intended to be disinherited, but to the residuary legatees intended to be endowed. (4 Kent's Com., 542, 666; *Earl* v. *Grim*, 1 Johns. Ch. R., 494; *Corrigan* v. *Kiernan*, 1 Bradf., 208; *Craig* v. *Craig*, 3 Barb. Ch., 76.)

GROVER, J. The testator, William Bostwick, at the time of his death, in April, 1863, was a resident of the State of Connecticut, and had been, for a number of years prior thereto. The validity of the bequests of his personal property, and all questions of succession thereto, or rights therein, must be determined under the laws of that State, and by the courts of that State, when the property, or those having the possession and control thereof, are within its jurisdiction. (*Parsons* v. *Lyman*, 20 N. Y., 103; *Moultrie* v. *Hunt*, 23 id., 394; Story on Conflict of Laws, § 468.) In addition to his personal property and real estate situated in Connecticut, the testator, at the time of his decease, was seized of real estate situated in the city of New York, of great value. The validity of the devise of the latter property, and all questions relating to the title, must be determined by the laws and courts of New York, irrespective of the domicil of the testator. (*Hosford* v. *Nichols*, 1 Paige, 220; Story's Conflict of Laws, §§ 424, 428, 445; 4 Kent's Com., 513.) The testator, after giving several legacies by the previous clauses of his will, by the seventh clause gave all the rest, residue and remainder of his property, both real and personal, wherever situate, to Henry White, John P. Crosby, and Pelatiah Perit, and the survivor of them, as joint tenants, in fee simple, upon certain specified trusts in favor of his daughter Frances, an infant, and her children, should she

leave any her surviving, and the descendants of any child, if any, whose parent died during the life of his daughter and her husband, if any, surviving her; and upon the further trust, in case of the death of his daughter, leaving no child or descendant of any child, or husband, her surviving (an event which has actually happened), to pay certain specified legacies to various charitable societies, and then divide whatever remained of the trust estate equally between the following six societies, namely: The Southern Aid Society; the American Tract Society; the American and Foreign Christian Union; the American Colonization Society; the Trustees of the Board of Domestic Missions, of the General Assembly of the Presbyterian Church of the United States; and the Board of Foreign Missions of the same church. The personal estate was more than sufficient to pay all the specific legacies given by the will. The first question to be determined is, whether any or all of these societies, had capacity to take real estate in New York by devise. As several of the societies claim a capacity so to take, upon grounds and principles different from others, it will be necessary to examine the question as to several separately. As the Southern Aid Society differs in this respect materially from all the others, it will be proper to consider the question as to that society first. This was a voluntary, unincorporated charitable association, engaged in aiding indigent evangelical churches and ministers in the southern section of the Union, prior to 1861. Whether it continued in existence as a society after that period, and to the time of the death of the testator, and until its incorporation under the general statute of the State, was a controverted question upon the trial; but the justice who tried the cause found, in substance, that it did so continue. That finding is conclusive upon this court. A voluntary association for charitable purpurposes cannot, under the law of this State, take a legacy given to it. (*Sherwood* v. *Amer. Bible Society and others*, 1 Keyes, 561.) If incapable of taking a legacy, it is clear that it has no capacity to take by devise. The counsel for the society insists, that by the terms of the will, all the real estate

of the testator, must be regarded as constructively converted into personal, and if so converted, then it should be disposed of by the law of Connecticut, where the testator had his domicil, under the law of which (as the counsel insists), such associations can take bequests of personal property. The question, whether the real estate, by the provisions of the will, was constructively converted into personal, is important, as its determination affects the rights of some of the other parties, among whom the residue is to be divided by its terms. The will empowers the trustees in their discretion, to sell and convey the real estate in Connecticut, and invest the proceeds in certain specified personal securities, or in real estate situate in certain States named, among which is New York. It contains no express authority to sell the New York real estate. The counsel for the aid society insists, that they had implied authority to sell such real estate, from the tenth clause of the will. The material part of that clause affecting this question is as follows: I hereby authorize and empower the trustees, who may hold any real estate in the State of Connecticut, or any personal estate in the State of Connecticut or elewhere under this will, to sell and dispose of the same, or any part or parts thereof, and to invest the avails at their discretion in certain specified personal securities, or in real estate in New York, or any of the New England States. This is substantially repeated in the same article of the will. It is insisted that the testator, from the length of time the trust would probably continue, must have intended that the trustees should have full power, to effect such changes, as future events might show would be advantageous and desirable, including the power to sell and convey any or all of the real estate. If such was his intention, it is difficult to see why it was not expressed in the will. The instrument itself shows, that it was carefully prepared with adequate professional aid. The testator knew that by far the larger portion of his real estate was located in New York, and by expressly conferring power upon the trustees to sell the comparatively small portion in Connecticut, and remaining silent as to that in New York,

he showed that he did not intend that the latter should be sold. Whether he intended, that the trustees should have power, to sell any real estate they might purchase in pursuance of the will, is not a very material question; but so far as it can affect the rights of the aid society, in respect to the real estate purchased by the trustees in New York, will be considered hereafter. But if this construction of the will is erroneous, and it should be held, that the will gave the trustees a discretionary power, of selling the real estate in New York, it would not aid the society in any respect. To constitute a conversion of real estate into personal, in the absence of an actual sale, it must be made the duty of and obligatory upon the trustees to sell it in any event. Such conversion rests upon the principle, that equity considers that as done which ought to have been done. A mere discretionary power of selling produces no such result. (Jarman on Wills, vol. 1, 523, 4 and 5; *Wright* v. *Trustees*, 1 Hoff., ch. 202, and authorities cited at 219; 2 Kent's Com., 11th ed., 230, note c.; 2 Story's Equity, sec. 1219; *Stagg* v. *Jackson*, 1 Coms., 206.) There can be no pretence of any conversion of the New York real estate, under the rule in the present case. The real estate, situated in New York, purchased by the trustees, and in part paid for from the personal property, must be regarded as real estate. The trustees were expressly empowered by the will, to convert the personal into real estate in New York, so far as they deemed expedient; and so far as they have done so, the property must be treated as real estate. (1 Jarman on Wills, 538, 539.) It follows that the Southern Aid Society can take no interest in any of the New York real estate. The testator, by the thirteenth clause of his will, gave to the person, who should at the time the property was to be conveyed, act as treasurer of any society, which he had made an object of his bounty, in case such society was unincorporated, the portion that he by previous clauses had given to such society, to be appropriated to the charitable uses and purposes of such society, and under its direction. This devise is invalid, so far as the person acting as treasurer of the aid

society is concerned. The person who is to take the property as trustee is sufficiently ascertained, but the beneficiaries are not ascertained or ascertainable with sufficient certainty to sustain, or in any way enforce the trust. They are indigent evangelical churches and ministers in the southern section of the Union. (*Bascom* v. *Albertson*, 34 N. Y., 584.) The incorporation of the society in 1866 does not affect the question. The property had become vested in others prior to that time, and their rights could not be affected thereby. The American Colonization Society claims the one-sixth of the property under the will. This society was incorporated in 1836, by an act of the legislature of Maryland, by which it was authorized, to take lands by devise, and to sell and dispose of such lands as the society should determine, to be most conducive to the objects of the society, namely, the colonizing of the free people of color of this country in Africa. The principal question to be determined, in regard to this society is, whether it can take land in this State by devise. We have already seen that this question must be determined solely by the law of this State. That it can take personal property by bequest, has been determined by this court. (*Sherwood* v. *The American Bible Society and others*, 1 Keyes, 561.) By the statute of this State concerning wills, passed in 1813 (1 R. L., 364), all persons (other than bodies politic and corporate) were permitted to take lands by devise, and might take to or for any lawful purpose whatsoever, without restraint. The exclusion of bodies politic and corporate from taking lands by devise, was the law of the State until the Revised Statutes took effect, and applied to all corporations of our own and other States and countries, unless the legislature, for special reasons, authorized a particular corporation so to take. This was the settled policy of the State. Such being the law and policy of the State at the time of the passage of the Revised Statutes, we find, that by the first section of the statute of wills therein contained (2 R. S., 57), all persons, with the exceptions therein specified, were empowered to dispose of their real estate by will. Section 2 of the act

defines real estate for this purpose. Section 3 provides, that such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise. What modification of the law is here indicated? By the act of 1813, bodies politic and corporate are excepted from the persons who may take by devise. By section 3 of the present statute of wills, all persons capable by law, to hold real estate, are authorized so to take, but providing that no devise to a corporation shall be valid, unless such corporation, by its charter or by statute, be expressly authorized so to take. Had the legislature, while the act of 1813 was in force, granted a charter to a corporation, and had therein enacted, that such corporation might take real estate by devise, can there be a doubt, that such a provision would have effected a repeal of the act as to such corporation? Or had the legislature, by a subsequent statute, enacted that one or any number of designated existing corporations, might take land by devise, such act would, as to such corporations, have repealed the exception in the act of 1813 by implication. Section 3 of the present statute, has the same effect precisely, upon all corporations not expressly authorized by charter or statute to take by devise, as the exception in the act of 1813 had upon all existing corporations, and all thereafter created, unless the latter were expressly authorized by their charter to take; and we have seen that, as to both classes, a subsequent statute, expressly authorizing any designated corporations to take land under a will, would by implication, have repealed the section as to them. The only modification of the law intended by the change in section 3, was to save the right of existing corporations, authorized by their charter or statute, to take by devise, if any such there were; for those incorporated subsequent to its passage, were as effectually deprived thereby, of the capacity to take by devise, as those incorporated subsequent to the act of 1813 were by the exception. Neither could take, unless expressly authorized by statute or charter, in which event both could take, unless some

distinction exists, between a statute and charter of a corporation in this respect, as used in the section. That the authority conferred by statute referred to in section 3, means a statute of this State only, is clear. That a statute of another State, conferring power upon a New York corporation to take land by devise, would be effectual to enable it so to take in the State passing it, is clear; but it is equally plain, that it could not affect its capacity to take land located in New York by devise. This shows that the word statute, as used in section 3, means a statute of New York. It will hardly be insisted that a statute of another State, conferring power upon a corporation created by itself, to take land by devise in New York, will enable it so to take, while a similar statute conferring the same power upon a New York corporation will have no such effect. But it is claimed, that by the true construction of section 3, power is given to all corporations, whose charters authorize them to take, by devise, to take in that manner in this State, irrespective of the government from which the charter is obtained. In other words, that section 3 authorizes all corporations to take lands in this State under a will, whose charters confer a capacity so to take. Creating or chartering corporations involves an exercise of the legislative power. They may be created by a particular statute, granting the charter or organized by virtue of general statutes prescribing the mode, specifying the powers and privileges to be enjoyed. In either mode the corporation is, in a legal sense, created by statute; and where section 3 provides, that no devise to a corporation shall be valid, unless such corporation be expresly authorized by its charter, or by statute, to take by devise, it is equally clear that such charters only were intended, as were granted by a statute of this State, or organized under a general statute of the State, as it is that by the words by statute, a statute of the State was intended. Any other construction would work a complete revolution of the policy of the State. That policy, as indicated by its whole legislation, is to exclude corporations generally from taking by devise. The legislature at all times have possessed the power, to except

such corporations as it deemed proper from its operations; and of late years have exercised it with great liberality, in favor of corporations organized for charitable purposes. But there is no indication of a design, to abandon the general policy of the State, by permitting other governments to determine, what corporations might take and hold lands in this State by devise, under the construction contended for by the counsel for the colonization society. Any corporation, to which the privilege of taking land by devise was refused by our legislature, might acquire that privilege by procuring and accepting a charter from another State conferring it. This would defeat the plain intention of section 3, which was to exclude all corporations from that right, except such as our legislature permitted for special reasons to enjoy it. It follows that the colonization society, can take no interest in the New York real estate under the will of the testator. The question, whether the real estate was by the provisions of the will converted into personal, has been already disposed of. The counsel insists, that as to the colonization society, such portion of the real estate in New York, purchased by the trustees, as was paid for by them from the personal estate, should be regarded and disposed of as personal, and this society declared, entitled to a share therein under the will. His position is, that the right to that portion of the personal property given to the society by the will, vested upon the death of the testator, and although contingent at that time, by the events that have since happened, the right has become absolute, and that it could not be impaired, while contingent, by a change in the character of the property made by the trustees. But this entirely overlooks one of the contingencies upon which the property, as personal property, was given to the society, namely, that the trust property should not, before the occurrence of the event, upon the happening of which the society was to take, be invested by the trustees in real estate, pursuant to the power given them by the will. The authorities (Williams on Exrs., 1176, and others cited) relate to cases, where executor's guardians of minors commit-

tees of lunatics, etc., have invested the personal property in real estate. In these cases it has been rightly held, that by such unauthorized investments, no change in the nature of the property was effected, so far as the right of succession was concerned. They have no application to the present case, where the investment was made under the power conferred by the will. In such cases we have seen, that after the investment is in fact made, the nature of the property is changed, and that the heir, instead of the personal representatives, are entitled to it. International comity has nothing to do with titles to real estate. They are regulated exclusively by the government where the real estate is situated. These views dispose also of the claims of the defendant, the trustees of the board of Domestic Missions of the General Assembly of the Presbyterian Church of the United States. That is a corporation formed under the laws of Pennsylvania, having power by its charter to take real estate by devise; but there is no law of this State authorizing it so to take. The defendant, the American Tract Society, is a corporation under chapter 266, p. 249, of the Laws of 1841. That act gives the corporation no power to take by devise, and consequently, the devise of real estate to it is invalid, by the express provisions of section 3 of the statute of wills. The amendment of its charter by the act of March 31st, 1866, authorizing the corporation to take by devise, cannot affect its rights in the present case, as the testator and his daughter died prior to that time; and all the real estate not effectually disposed of by the will, vested in some of the persons claiming as heirs prior thereto. The position that the State, by subsequent legislation, could give validity to this void devise, is entirely fallacious. The property vested in heirs can no more be taken from them, and bestowed upon others, by legislation, than that of any other class; and the act in question makes no such attempt. It will be proper next to determine, whether the heirs of the testator, or those of his daughter Frances, are entitled to that part of the real estate, not disposed of by the will; as, in case it shall be held that the latter are entitled, it

will be unnecessary to examine the questions raised, as to the rights of the two corporations, held by the Supreme Court, entitled each to one-sixth of the real estate in the lands purchased, as the heirs of the daughter have not appealed from the judgment. I understand the position of the counsel of the heirs of the testator to be this: That, under the will, the estate vested in the trustees during the life of the daughter, in trust for her, and upon her death, upon the further trust to convey to her husband and children, etc., as provided by the will, and that during her entire life, it was contingent whether she would leave her surviving, any person or persons entitled to the estate under this part of the will, and that until that time, it was uncertain, whether the entire estate was disposed of by the will or not, and that therefore, no legal estate did or could vest in the daughter. It is an elementary principle, that seizin in the ancestor is essential to a transmission of the estate from him to his heir. If it be true that there was no seizin of the estate by the daughter, no title can be derived from her as her heir. It is equally clear, that if she was seized, the title vested in her heirs upon her death. We have already seen, that in the events that have actually happened, four-sixths of the real estate were not disposed of by the will. Whether during the period of the contingency of the events upon which this result depended, this portion of the estate vested in the trustees or was in abeyance, must be determined by the provisions of the statute (1 R. S., 729, 730), or if it cannot be so determined by the common law, section 60 of the statute provides, that every express trust, valid as such in its creation, except as therein otherwise provided, shall vest the whole estate in the trustees, in law and equity, subject only to the execution of the trust; that the persons for whose benefit the trust is created, shall take no estate or interest in the land, but may enforce the performance of the trust in equity. Section 61 provides, that the preceding section shall not prevent any person creating a trust, from declaring to whom the lands to which the trust relates shall belong, in the event of the failure or termination of the trust; nor shall it prevent

him from granting or devising such lands, subject to the execution of the trust. Every such grantee or devisee shall have a legal estate in the lands, as against all persons, except the trustees and those lawfully claiming under them. Section 62 provides, that when an express trust is created, every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust, or his heirs, as a legal estate. A remainder in four-sixths of the real estate, contingent upon the death of the daughter, leaving no descendant her surviving, was not embraced in the trust, as the devisees were incapable of taking, and this remainder was not disposed of by the will. By the provisions of section 62, this remainder, upon the death of the testator, vested in his heirs. His daughter was his sole heir. She therefore became seized of this remainder as heir of her father, and being seized, upon her death, it goes to her heirs. Those who would have been heirs of the testator, had he survived his daughter, are entitled to no interest in the land. The heirs of the daughter have not appealed from the judgment. They are the only parties prejudiced by that provision of the judgment, declaring that the real estate purchased by the trustees in New York must, so far as the purchase-money was paid from the personal estate, be regarded and disposed of as personal property, so far as their rights as heirs are concerned. This provision of the judgment cannot be corrected by this court. Why it should have been so held, in respect to the rights of the heirs and some of the other parties, and not as to all, I am unable to determine; but as the only parties prejudiced by holding, that it should as to some of the parties, be disposed of as personal property, did not except to the ruling, and have not appealed, the judgment in this respect must be affirmed; and the Board of Foreign Missions of the Presbyterian Church in the United States, and the American and Foreign Christian Union, are entitled to all that has been awarded to them by the judgment. The two defendants last named have not appealed from the judgment, and cannot therefore, ask for any modification thereof favorable to them.

I have deemed it unnecessary to notice the suggestions of counsel, as to the remoteness of the relationship of the persons claiming as heirs, or the anxiety of the testator, apparent from the will, that this property, in the events that have happened, should be bestowed upon the charitable objects specified in the will, as such considerations are entitled to no weight upon the questions to be determined. So far as competent persons make disposition of their property by will, pursuant to the rules of law, the disposition is valid and will be upheld. So far as they fail to make such disposition, the heirs and next of kin are, by law, entitled to the property; and any intention of the deceased, however ascertained, can have no effect upon their legal rights. The judgment appealed from must be affirmed, with costs to the respondents, to be paid by the plaintiffs out of the estate. From the allowances made by the court below, I think the appellants have been sufficiently compensated for the unsuccessful contest made, and should not be awarded costs, in effect to be paid by those entitled to the property.

All concur.

Judgment accordingly.

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THE BANK OF ALBION, Appellant, *v.* ROBERT BURNS et al., Respondents.

Where the real estate of a wife is mortgaged to secure the debt of her husband, she occupies the position of a surety, and she, and those claiming under her, are entitled to the benefit of the rules, prohibiting the dealing of the creditor with the principal debtor, to the prejudice of the surety. An extension of the time of payment, without her assent, is such a dealing, and discharges the mortgage.

Whether it can be shown, by extrinsic evidence or verbal agreement, that such a mortgage, conditioned for the payment of a sum certain within a specified time, was in fact, given as a continuing guaranty for any and all indebtedness to the amount stated, *quere*. At least, such effect cannot be given to the security, without competent proof of the assent of the mortgagor.

Statement of case.

The agency of the husband to bind the wife, to be inferred from the possession of the mortgage, has respect to, and is limited by, the terms of that instrument.

The fact that the mortgagee, had no actual knowledge of the fact that the wife owned the mortgaged premises, and of the resulting relationship of principal and surety between the husband and wife, is not material where the title is on record. He is chargeable with knowledge.

(Argued June 19, 1871; decided September 2, 1871.)

APPEAL from judgment of the late General Term of the Supreme Court in the eighth judicial district, reversing a judgment entered upon the report of a referee. (Reported below, 2 Lansing, 52.)

The plaintiff brought this action to foreclose a mortgage, given by Oscar F. Burns and wife, upon property of the wife, in August, 1861, to secure the payment of $2,000, with interest thereon, according to the condition of the bond of the husband of the same date. The bond was conditioned for the payment of the sum named and interest thereon; one-half in three months; one-half in six months, interest on all sums unpaid, payable at the time of each payment. At the time of the delivery of the bond and mortgage to the plaintiff by Oscar F. Burns, another bond and mortgage upon property of the husband for $3,000, payable one-half in six months, and one-half in one year, was also delivered to the plaintiff, and a paper was given to Burns, signed by the president of the plaintiff, to the effect that the two bonds and mortgages, were received and held as collateral security for the payment of any and all claims and demands, which the plaintiff then had, or might thereafter have against Oscar F. Burns, by notes, drafts, checks, or otherwise, and for all liabilities, notes, etc., on which the said Burns was, or might become liable. The $3,000 mortgage was subsequently surrendered to the mortgagor at his request.

Mr. and Mrs. Burns were married in 1850, and Mrs. Burns died in March, 1862, and Mr. Burns in July, 1866; and the defendants are their infant children and heirs-at-law, to whom the mortgaged premises have descended from their mother.

Statement of case.

I have deemed it unnecessary to notice the suggestions of counsel, as to the remoteness of the relationship of the persons claiming as heirs, or the anxiety of the testator, apparent from the will, that this property, in the events that have happened, should be bestowed upon the charitable objects specified in the will, as such considerations are entitled to no weight upon the questions to be determined. So far as competent persons make disposition of their property by will, pursuant to the rules of law, the disposition is valid and will be upheld. So far as they fail to make such disposition, the heirs and next of kin are, by law, entitled to the property; and any intention of the deceased, however ascertained, can have no effect upon their legal rights. The judgment appealed from must be affirmed, with costs to the respondents, to be paid by the plaintiffs out of the estate. From the allowances made by the court below, I think the appellants have been sufficiently compensated for the unsuccessful contest made, and should not be awarded costs, in effect to be paid by those entitled to the property.

All concur.

Judgment accordingly.

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THE BANK OF ALBION, Appellant, *v.* ROBERT BURNS et al., Respondents.

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Whether it can be shown, by extrinsic evidence or verbal agreement, that such a mortgage, conditioned for the payment of a sum certain within a specified time, was in fact, given as a continuing guaranty for any and all indebtedness to the amount stated, *quere*. At least, such effect cannot be given to the security, without competent proof of the assent of the mortgagor.

Statement of case.

The agency of the husband to bind the wife, to be inferred from the possession of the mortgage, has respect to, and is limited by, the terms of that instrument.

The fact that the mortgagee, had no actual knowledge of the fact that the wife owned the mortgaged premises, and of the resulting relationship of principal and surety between the husband and wife, is not material where the title is on record. He is chargeable with knowledge.

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Mr. and Mrs. Burns were married in 1850, and Mrs. Burns died in March, 1862, and Mr. Burns in July, 1866; and the defendants are their infant children and heirs-at-law, to whom the mortgaged premises have descended from their mother.

Statement of case.

At the time of the delivery of the bond and mortgage, Oscar F. Burns was indebted to the plaintiff in the sum of $4,178.14, which indebtedness was diminished and decreased from time to time, and the referee, before whom the case was tried, reports "that but little if any portion of said indebtedness was ever paid, but that the same was extended from time to time, new notes being given therefor, that the indebtedness of said Oscar F. Burns to said plaintiff gradually increased by accumulations of interest and new loans, and at the time of his death he was indebted in the sum of $14,000;" and that the amount due on the bond and mortgage was, at the date of the report, $2,910. Judgment of foreclosure in the usual form was given upon the report. Upon appeal the judgment was reversed by the General Term of the Supreme Court sitting in the eighth district, and a new trial granted; and from the last order the plaintiff has appealed to this court, stipulating that upon affirmance of the order, judgment absolute be given for the defendants.

H. R. Selden, for appellant. As the judgment is not reversed upon any question of fact, no question is presented beyond exceptions to evidence and to the referee's conclusions of law. (Code, § 268, subdivision 4; id., § 272, subdivision 7; *Baldwin* v. *Van Deusen*, 37 N. Y., 487–490; *Shibley* v. *Angle*, id., 631; *East River Bank* v. *Kennedy*, 4 Keyes, 279.) The bond and mortgage were given as continuing security, and Burns had a right so to use it. (*Agawam Bank* v. *Strever* 18 N. Y., 510, 511, and cases cited; *Seneca Co. Bank* v. *Mass.*, 3 N. Y., 43; *Lawrence* v. *Tucker*, 23 How., U. S., 14–27; *Robinson* v. *Williams*, 22 N. Y., 380; *Young* v. *Wilson*, 27 N. Y., 351.) The testimony cannot be resorted to, to overthrow the finding of the referee. (*Grant* v. *Morse*, 22 N. Y., 323, 324; *Colwell* v. *Lawrence*, 38 id., 71, 76, 77; *Milburn* v. *Belloni*, 39 id., 54; *East River Bank* v. *Kennedy*, 4 Keyes, 279, 284; *Bergen* v. *Wemple*, 30 N. Y., 319, 324.) This court can only look to the order, not the opinion of the court below for evidence, that the reversal pro-

ceeded upon a question of fact. (Code, §§ 268, 272; *East River Bank* v. *Kennedy*, 4 Keyes, 283, 284.) The extension of time of payment of the debt, as security for which the bond and mortgage was pledged, did not discharge the surety. (*Gahn* v. *Niemcewicz*, 11 Wend., 312; see opinion of NELSON, J., pp. 320–322; *Roosevelt* v. *Mark*, 6 John. Ch., 266; see the opinion of the chancellor, pp., 279–284, and the cases there cited, and particularly *Toussaint* v. *Martinnant*, 2 T. R., 100; and *Martin* v. *Court*, id., 640; also, *Monell* v. *Smith*, 5 Cow., 441; *Monell* v. *Smith*, 5 Cow., 444.)

S. Hand, for respondents. The title appearing upon record in Mrs. Burns', plaintiff, is chargeable with knowledge. (*Purdy* v. *Huntington*, 42 N. Y., 334; *Briggs* v. *Palmer*, 20 Barb., 392; *Smith* v. *Townsend*, 25 N. Y., 479.) The wife stood simply in the relation of surety. (*Vartie* v. *Underwood*, 18 Barb., 561; *Loomer* v. *Wheelright*, 3 Sandf. Ch., 135; *Hawley* v. *Bradford*, 9 Paige, 200; *Fitch* v. *Colheat*, 2 Sand. Ch., 29.) The payment of the debt or extension of time would release her. (*Smith* v. *Townsend*, *supra*; *Billington* v. *Wagner*, 33 N. Y., 31; *Henderson* v. *Marvin*, 31 Barb., 297; *Draper* v. *Prescott*, 29 Barb., 401; *Gahn* v. *Niemcewicz*, 11 Wend., 312; *Place* v. *McIlvain*, 38 N. Y., 96; *Fellows* v. *Prentiss*, 3 Den., 512; *Bangs* v. *Mosher*, 23 Barb., 478; *Myers* v. *Welles*, 5 Hill, 475; *Bank of Orleans* v. *Barry*, 1 Den., 116; *Hart* v. *Hudson*, 6 Duer., 294; Pitman on Surety, 170, 171, 172, 40 Law Lib.) The debt for which mortgage was security was paid before suit. (*Dows* v. *Moorewood*, 20 Barb., 183; *Hunter* v. *Osterhout*, 11 Barb., 33; *Allen* v. *Culver*, 3 Den., 284; *Webb* v. *Dickinson*, 11 Wend., 62; *Shepperd* v. *Steele*, 4 Hand, 52; *Thorns* v. *Kelsey*, 30 Barb., 126; *Bank* v. *Brown*, 1 N. Y. Legal Ob., 149; *Patterson* v. *Hull*, 9 Cow., 747; *Loomer* v. *Wheelright*, 3 Sand. Ch., 135.) The time of payment was extended for a valid consideration, and surety discharged. (*Pratt* v. *Coman*, 37 N. Y., 440; *Day* v. *Sanders*, 3 Keyes, 347; *Place* v. *McIlvain*, 38 N. Y., 96; *Bangs* v. *Mosher*, *supra*;

Hart v. *Hudson*, *supra*; *Newsam* v. *Finch*, 25 Barb., 175; *Insurance Co.* v. *Diefendorf*, 43 Barb., 444; *Neff's appeal*, 9 Walls & Serg., 36; *Delacroix* v. *Bulkley*, 13 Wend., 75.) The surety was released by the discharge of the $3,000 mortgage. (*Loomer* v. *Wheelwright*, 3 Sandf. Ch., 135; Powell on Mortgage, 871, note 1; *Pitts* v. *Congdon*, 2 Comst., 352; *Bank of Manchester* v. *Bartlett*, 13 Verm., 315; *Cheseboro* v. *Millard*, 1 J. Ch. R., 409; *Bridenbeck* v. *Lowell*, 32 Barb., 9.) No delivery of mortgage so as to make it valid. (*Catlen* v. *Jackson*, 8 John., 521; *Elsey* v. *Metcalf*, 1 Den., 323; *Freeman* v. *Pray*, 23 Ark., 439.) At least valid only according to its terms. (*Stringham* v. *Insurance Co.*, 3 Keyes, 280.) Burns had no authority to pledge it as security. (1 Powell on Mortgages, 28, 29, note R., 8 Taunt., 101; *D'Bouchet* v. *Goldsend*, 5 Vesey, 211; *Henry* v. *Marvin*, 3 E. D. Smith, 71; *Kennedy* v. *Strong*, 14 J. R., 128; *Rodriguez* v. *Heffermon*, 5 J. Ch., 417; *Borritto* v. *Mosquera*, 2 Bosw., 101; *Walther* v. *Whetmore*, 1 E. D. Smith, 7; *Bloomer* v. *Waldron*, 3 Hill, 361; *Coutant* v. *Servoss*, 3 Barb., 128; *Cummings* v. *Williamson*, 1 Sands. Ch. R., 17.)

ALLEN, J. The fact that the president of the bank of Albion, the mortgagee, had no actual knowledge of the ownership by Mrs. Burns of the mortgaged premises, and the resulting relationship of principal and surety between Burns, the debtor to the bank, and his wife, the mortgagor of her individual property, is not material. The debt was the debt of Burns, and was contracted by him with the plaintiff. The title of Mrs. Burns was upon record, and the plaintiff is chargeable with knowledge of it and the legal consequences resulting therefrom.

One who takes a conveyance of real property from the rightful owner, must be regarded as taking in subordination to the true title and with full knowledge of it, so far as it appears upon record. (*Smith* v. *Townsend*, 25 N. Y., 479; *Purdy* v. *Huntington*, 42 id., 334.) The property of the wife having been mortgaged to secure the debt of her hus

band, she occupied the position of a surety, with all the rights, legal and equitable, incident to that relation; and the defendants having succeeded, by inheritance, to the estate and interest of their mother, occupy the same position, and are entitled to every defence which could have availed to the original mortgagor had she lived. (*Gahn* v. *Niemcewicz*, 11 W. R., 312; *Loomis* v. *Wheelright*, 3 Sandf. C. R., 135; *Smith* v. *Townsend*, *supra*.) The wife, and those claiming under her, are entitled to the benefit of the rules, prohibiting all dealings of the creditor with the principal debtor, to the prejudice of the surety.

An extension of the time of payment, without the assent of the surety, is such a dealing as operates to discharge the surety, the law presuming injury to the surety from such extension. (*Gahn* v. *Niemcewicz*, *supra*.) The first question is as to the character of the instrument, and whether it is as claimed a continuing guaranty of the debts of Oscar F. Burns to the plaintiff. By its terms it is conditioned for the payment of the bond of Burns to the bank for $2,000, payable in three and six months, with interest. It is as explicit as language could make it, in the specification of the obligation to which it was collateral, and of the debt to secure the payment of which it was given. Without stopping to inquire, whether a mortgage specifically conditioned for the payment of the bond of a third person for a given sum, within a limited time can, by extrinsic evidence or verbal agreement, be made to serve as a continuing security to the mortgagee for debts thereafter to be contracted, without respect to the form or character of the obligation, or limit as to time, either of the creation or payment of the debt; such effect cannot be given to the security, without some competent evidence that such was the intent of the mortgagor.

The intent of the contracting parties must be primarily sought in the words and terms of the contract; and when there is no ambiguity, effect must be given to the contract as expressed in the instrument. Here there is no ambiguity, and it may well be doubted, whether it would be competent

for the mortgagee to show, that the mortgage was in fact given, to secure any and all indebtedness of Burns to the amount of $2,000, that might accrue thereafter for any cause, instead of the specific obligation mentioned in it.

It would certainly very essentially vary and change the contract of the mortgagor, and create a very different liability from that indicated by the terms of the deed. This can only be done by the assent of the mortgagor, to be proved by competent evidence. There is no evidence in the case to warrant the finding of the referee, that the mortgage was executed or delivered for any purpose other than that expressed upon its face.

It is not claimed that the mortgagor in person delivered the mortgage for such purpose, or that she had any knowledge of the transaction, between the mortgagee and her husband at the time of the delivery. The claim of the plaintiff to hold the mortgage as a continuing guaranty, rests upon a supposed agency of the husband to act for and bind the wife, the only evidence of such agency, or its extent, being the possession of the mortgage by the husband. The agency to be inferred from the possession of the mortgage must have respect to, and be limited by, the terms of that instrument. It cannot be extended by implication. The most that can be inferred is, that the husband had authority to bind the property of the wife, by the delivery of the mortgage to the plaintiff, for the sum named, payable at the times and in the manner specified in the bond, to which it was collateral, that is, to deliver the mortgage as a valid instrument, to take effect according to its terms.

She by executing the mortgage and delivering it to her husband, consented to the delivery of it to the mortgagee, to take effect according to its terms, and thereby to pledge her property for his benefit, to the amount and for the time therein mentioned. It was not an unlimited power of attorney, a pledge of her property for an unlimited amount, or for the payment of a debt at any time in the future. She limited the time, as well as the amount, for which she mortgaged her estate. She

did not, in terms or by implication, consent to be bound for a debt to be contracted ten years thereafter, and payable twenty years or any other time in the future.

The inference is, that it was intended as a security for a debt then existing, or which should be created thereafter, but which should be payable within the time limited by the terms of the mortgage. The wife might well consent to become the security for the debt of her husband, payable within a short time, when she would not consent to become security for a debt payable indefinitely in the future, or at a long day.

At the time of the delivery of the mortgage, there was a debt of over $4,000 due the plaintiff, which was not diminished at the expiration of six months thereafter, and it does not appear that a special loan was made on the security of the bond and mortgage, or that the amount named therein, or any amount, was advanced, as a special advance upon it, as a security.

No injustice will therefore be done the plaintiff, by regarding this mortgage as a security for the then existing debt, to the amount of $2,000; for, if not a security in that form, and to that extent, it never became a valid instrument for any purpose. That debt was in the form of bills and notes of Oscar F. Burns, of different amounts, and payable at different dates. The bond and mortgage were without consideration, independent of the debt to the bank represented by the notes, and to which they were collateral.

The principal debt consisted of the notes of Burns. An extension of the time of payment of these notes, by a renewal or otherwise, necessarily suspended all rights and remedies upon the bond and mortgage. (*Putnam* v. *Lewis*, 8 Johns., 389; *Myers* v. *Welles*, 5 Hill, 463; *Fellows* v. *Prentiss*, 3 Denio, 512.)

There could be no default in the condition of the bond or forfeiture of the mortgage, except by a failure to pay the principal debt at maturity; and an action upon the bond, or to foreclose the mortgage, could only be maintained upon a default to pay the debt, which they were given to secure.

Statement of case.

The debt, whether represented solely by these securities or by other instruments, and collaterally secured by the bond and mortgage, must be over due, to give the mortgagee a right of action upon the securities. The evidence and the statement of the indebtedness furnished by the plaintiff, show that the debt that existed at the time of giving the mortgage, as well as that which had an existence during the six months thereafter, was paid long before the death of Burns and the commencement of this action. But aside from that, the referee has found an extension of the time of payment, by repeated renewals of the obligations. This operated as a release of the surety and discharge of the mortgage. (*Myers* v. *Welles, supra*; *Smith* v. *Townsend, supra.*)

The order granting a new trial should be affirmed, and judgment absolute given for the defendant, pursuant to the stipulation.

All concur but CHURCH, Ch. J., not voting.

Judgment accordingly.

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IN THE MATTER OF THE PETITION OF THE NEW YORK PROTESTANT EPISCOPAL PUBLIC SCHOOL et al. TO VACATE AN ASSESSMENT.

The act of April 12th, 1865 (chapter 381, Laws of 1865), prohibiting the construction of a sewer in the city of New York, unless in accordance with a general plan, applies to cases where proposals had been advertised for and bids opened before the passage of the act.

The power of the legislature to regulate the construction of such public works, cannot be foreclosed by any contracts of a municipal corporation.

(Argued May 23d, 1871; decided September 2d, 1871.)

APPEAL from an order of the General Term, first department, affirming order of Special Term, denying a petition to vacate an assessment for a sewer in Seventy-fourth street from Fifth avenue to the East river in the city of New York. (Reported below 58 Barb., 161, and 40 How., 139.)

Statement of case.

The petitioners applied to the Special Term, for an order vacating the assessment above mentioned pursuant to the act, chapter 338, Laws of 1858.

The alleged irregularities in the assessment proceeding are:

1. That the assessment has never been confirmed by the common council.

2. That no general plan of a sewerage district, including the sewer in question, was adopted by the Croton aqueduct board, as is required by the act, chapter 381, Laws of 1865, passed April 12th, 1865.

The proof shows, that proposals for the construction of the sewer in question were received, pursuant to advertisement, previous to the *6th of April*, 1865, and opened on that day.

That the contract was executed on the *13th day of April*, 1865.

The assessment was confirmed by the board of revision and correction of assessments on the 15th day of May, 1868.

The map of the sewerage district, in which the sewer in question is located, was not adopted until October, 1865.

C. E. Miller, for appellants. The assessment is illegal. (*In re Blodgett*, Court of Appeals.) The contractor acquired no vested right. (*People* v. *Kent*, 27 N. Y., 188; *Presb. Ch.* v. *Mayor*, 5 Cow., 538; *Britton* v. *Mayor*, 21 How. Pr., 251; *Smith* v. *Mayor*, 10 N. Y., 504; *People* v. *Croton Aq. Dep.*, 6 Abb., 42; *People* v. *Aldermen*, 11 id., 289; *People* v. *Smith*, 12 id., 133.) The provision of the act of 1861, creating a board of revision, is unconstitutional. (*Town of Fishkill* v. *Plankroad Co.*, 22 Barb., 634; *People* v. *Hills*, 35 N. Y., 449; *Baldwin* v. *Mayor*, 2 Keyes, 387, 392; *People* v. *O'Brien*, 38 N. Y., 193; *Smith* v. *Mayor*, 7 Robt., 190; *Pullman* v. *Mayor*, 54 Barb., 169; *Gaskin* v. *Meek*, 42 N. Y., 404, 417; *People* v. *Com'rs of Highways of Town of Palatine*, 53 Barb., 70; *People ex rel. Lee* v. *Board of Supervisors of Chautauqua Co.*, N. Y. Trans., March 18, 1871; *Davis* v. *Tax Com'rs*, General Term, 1871, opinion of INGRAHAM, J.)

R. O'Gorman, for the mayor, etc., of the city of New York, respondents. The act of 1861 is constitutional. (*Sharp* v. *The Mayor*, 18 How., 97, INGRAHAM, J.; *Outwater* v. *Mayor*, id., 572; *The Sun Mut. Ins. Co.* v. *The Mayor*, 4 Seld., 252; *People* v. *Lawrence*, 41 N. Y., 139, and cases there cited.) The act of April 12, 1865, has no application to this case. (*Reed* v. *Mayor*, 12 Leg. Obs., 38; *Smith* v. *Mayor*, 10 N. Y., 504; *Moon* v. *Durden*, 2 Exch., 22; *Dash* v. *Van Kleek*, 7 Johns., 477; *Wood* v. *Oakley*, 11 Paige, 400; *Johnson* v. *Brownell*, 2 Hill, 238; *Butler* v. *Palmer*, 1 id., 324; *Snyder* v. *Snyder*, 3 Barb., 621; *Hackley* v. *Sprague*, 10 Wend., 114; *McMannis* v. *Butler*, 49 Barb., 176.)

RAPALLO, J. By the act of April 12, 1865, the construction of any sewer or drain in the city of New York is absolutely prohibited, unless such sewer or drain shall be in accordance with a general plan, devised by the Croton board, for the sewerage of the particular district in which such sewer or drain is proposed to be constructed. And in *The Matter of Blodgett* (decided October 24, 1870), this court decided, that an assessment for a sewer contracted for, before such a general plan had been devised was void. That decision must control this case, unless the respondents can maintain the position, that the act of April 12, 1865, does not apply where proposals for the work had been advertised for, and bids opened, before the passage of the act. But we do not think that position tenable. There is no such reservation in the act itself, nor do we think that such a reservation can be intended. The manifest design of the act, was to secure a harmonious system of sewerage for the entire district; and the reservation sought to be introduced, might have the effect of interfering with the general plan, so as to defeat the very object which the act was designed to secure.

It is not material to pass upon the question of the constitutionality of the act of 1861 (chap. 308), or whether, on the opening of the bids, the lowest bidder acquired a vested right to a contract for the construction of the sewer. Assuming

that he did, or even that the city had entered into a formal contract with him before the passage of the act of 1865, such contract would not deprive the legislature of the power to prohibit the construction of the sewer.

Whether the city would be discharged by the act, from liability to the contractor for damages for the breach of the contract, is a different question. But the power of the legislature to regulate the manner in which public works of this description shall be constructed, cannot be foreclosed by any contract of a municipal corporation for the doing of the work.

The act of 1865, by its terms, applies to all sewers thereafter to be constructed.

It is claimed, that in order to prevent its interfering with vested rights of contractors, it should be restricted, by construction, to sewers thereafter to be contracted for. In view of the special object sought to be attained by the act, we do not think such a construction admissible. Its clear intent, was to prevent the building of any sewer, not in accordance with the general plan directed to be devised. This intent would be defeated, should the courts take the liberty of construing the act so as to sanction other sewers, which might be found totally inconsistent with the general plan when adopted, simply for the purpose of protecting contracts entered into prior to the passage of the act.

The order appealed from should be reversed, and the assessment vacated, with costs.

All concur.

Order reversed.

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HARRIET N. FLORENCE, Appellant, *v.* EUPHEMIA HOPKINS, etc., Respondents.

To maintain an action for the partition of lands, the plaintiff must, at the time of its commencement, have actual or constructive possession in common with defendants. A subsisting adverse possession is an absolute bar.

The possession of one of several tenants in common may become adverse, when his acts amount to an exclusion of his co-tenants; and, until the excluded parties regain their possession, no one of them can bring partition. The duration of the adverse possession is immaterial.

(Argued April 28, 1871; decided September 2, 1871

APPEAL from judgment of the late General Term of the second judicial district, affirming a judgment entered in Westchester county upon the report of a referee, dismissing plaintiff's complaint.

On the 30th November, 1808, Peter Florence died seized in fee of the premises described in complaint, leaving a widow and six children, and also leaving a last will and testament, containing a general power in trust to his executors to sell the real and personal estate.

Benjamin Florence, one of the sons of deceased, continued to reside on the premises, and had the use and control thereof.

On the 13th July, 1811, the executors, in their own names, executed to said Benjamin a warranty deed of the premises; consideration expressed, $1,250; the widow joining in the deed. Mortgages were given for the purchase-money, which were subsequently foreclosed. The premises were sold and conveyed, by master's deed, to Minot Mitchell, October 24, 1827, who on the 26th April, 1828, conveyed the same, by quitclaim deed, to said Benjamin Florence, who on the 1st November, 1859, conveyed it to his two daughters, Euphemia Hopkins and Mary Ann Lawton, and on the 18th September, 1866, the latter conveyed the undivided one-half to the former.

Benjamin Florence retained possession of the premises until his death, which occurred in September, 1865. None of the

other heirs of the testator interfered in the management, or participated in the enjoyment of the same.

After his death his two daughters had possession until the deed to Euphemia Hopkins, who has occupied it since that time, claiming to be the owner in fee.

Samuel Hand, for appellant. That the will gave the executors simply a naked power in trust. (*Waldron* v. *McComb*, 1 Hill, 111; *Bloomer* v. *Walden*, 3 Hill, 363, 372; *Allen* v. *De Witt*, 3 Comst., 276.) The deed given was void. (*Nixon* v. *Hyserott*, 5 Johns., 58; *Clark* v. *Davenport*, 1 Bos., 117.) Benjamin Florence was disqualified from purchasing. (*Judson* v. *Gibbon*, 5 Wend., 229; *Weaver* v. *Marvin*, 14 Barb., 376; *Van Horn* v. *Fonda*, 5 John., Ch., 388; *Briggs* v. *Davis*, 20 N. Y., 15.) The title under the foreclosure was void. (*Requa* v. *Holmes*, 16 N. Y., 193; 26 N. Y., 338.) The deed from Mitchell inured to benefit of estate. (*Van Horn* v. *Fonda*, 5 Johns., Ch., 388; *Torry* v. *Bank of Orleans*, 9 Paige, 649; *Iddings* v. *Breen*, 4 Sandf. Ch., 223.) A party not required to elect until all the facts are known. (2 Story Eq. J., § 1097, 1098; *Dennistown* v. *Hubbell*, 10 Bos., 166.) The same rule applies to ratification and waiver. (*Hayes* v. *Stone*, 7 Hill, 132; *Semour* v. *Wyckoff*, 10 N. Y., 213; *Nixon* v. *Palmer*, 8 id., 398; 2 Greenleaf, Ev., § 66; *Cumberland Co.* v. *Sherman*, 30 Barb., 575; *Medrand* v. *Girod*, 4 How. U. S., 560.) The statute of limitations not applicable. (*Yeller* v. *Eckers*, 4 How. U. S., 289; *Edwards* v. *Bishop*, 4 Comst., 61; *Clapp* v. *Bromagham*, 9 Cow., 555.) There was no adverse possession. (*Bradstreet* v. *Clark*, 12 Wend., 602; *Livingston* v. *Peru Iron Co.*, 9 Wendell, 512; *Crary* v. *Goodman*, 22 N. Y., 170; *Humbert* v. *Trinity Church*, 24 Wend., 586; *Crary* v. *Goodman*, 22 N. Y., 170; *Jackson* v. *Dennison*, 4 Wend., 558; *Cook* v. *Travis*, 20 N. Y., 400; *Calkins* v. *Isbell*, 20 id., 147: *Requa* v. *Holmes*, 26 N. Y., 338; *Devoe* v. *Fanning*, 2 Johns. Ch., 252; *Van Horn* v. *Fonda*, 5 id., 416 op.; *Prescott* v. *Neevers*, 4 Mason, 334; Angell on Limitations, § 418; *Baker* v. *Whiting*, 3

Sumner, 476.) Mitchell's deed was taken subject to the trust. (*Smith* v. *Bowen*, 35 N. Y., 83; *Johnson* v. *Batsdory*, 11 Johns., R., 97 of op.; *Fisher* v. *Fields*, 10 id., 506 of op.; *Wormley* v. *Wormley*, 3 Wheaton, 421; *Allen* v. *De Witt*, 3 Comst., 276.)

J. W. Tompkins, for respondent. That partition cannot be maintained. (Van Sandford's Equity Pleading, 305; 2 Barb. Ch'y, 408; 5 Denio, 385; 1st Edition Crary's Special Proceedings, 317, 319; 11th N. Y. Legal Observer, *Stryker* v. *Lynch*, 116; 2 Rev. Stat., 5th ed., p. 30, § 167; 17th Abbott's Practice Reports, 452; 34 Barb., 56.) Plaintiff's claim of ignorance does not excuse delay in bringing action. (5 Barnwell & Cress, 149; 20 Wend., 587; 20 John., 33; 5 Wend., 17, 30, 202; 24 Wend., 587; 9 John, 174; 10 John., 356; 13 John., 118; 18 John., 40, 355; 9 Wend., 511.) A conveyance by a trustee sufficient foundation for an adverse possession. (5 Cowen, 101; 3 Cowen, 229; 12 Wend., 602, 675; *Bradstreet* v. *Clark*.) The question of good faith is immaterial. (24 Wend., 587, 603; *Humber* v. *Trinity Church*, 26 Barb., 383, 402; Sand. Ch., 633, 738.) The action is barred. (*Bailey* v. *Jackson*, 16 John., 210; 10 Wend., 363.)

RAPALLO, J. To maintain an action for the partition of lands, the plaintiff must, at the time of the commencement of the action, have an actual or constructive possession, in common with the defendants, of the land sought to be partitioned. Where the premises are held adversely, the party out of possession cannot try the question of his title in this form of action. A subsisting adverse possession, is an absolute bar to the action. It is intended for the partition of lands in the possession of part owners, and not for the recovery of the possession of premises held adversely.

This was the rule of the common-law. If one coparcener disseized another, during the disseizin, a writ of partition would not lie between them; and the reason was, that they

did not hold together and undivided. (Co. Litt., 167, 6; 16 Viner., 225, partition 1.)

Though adverse possession and disseizin may not be in all particulars identical, their effect is the same for the purpose of terminating a possession in common.

The Revised Laws of 1813, 1 R. L., 507, authorized proceedings for a partition where lands were *held* in joint tenancy, tenancy in common, or coparcenery.

Under that act it was decided by the Court of Errors in *Clapp* v. *Bromagham* (9 Cow., 530), decided in 1827, that an adverse possession for twenty years was a bar to proceedings for partition; but the chancellor, in delivering the opinion of the court, intimated very clearly, that an adverse possession for a shorter period, would have the same effect upon the suit of a party who was out of possession. He declined, however, to decide that point; and I do not find that it has been expressly passed upon by this court.

In the Revised Statutes the provision of the revised laws relating to partition was made more explicit. By 2 R. S., p. 317, § 1, the right to institute proceedings by petition is limited to cases, where several persons "shall hold and be in the possession of lands as joint tenants or tenants in common; and by section 79 of the same title (page 329), it is provided, that the Court of Chancery shall have the same power upon petition or bill filed in that court, to decree partitions and sales of lands, etc., as is given to the common-law courts in like cases. From the reviser's notes to section 1, and to sections 16, 17, 18, 19 of the same title, it appears that the section originally proposed, required that the petitioner or complainant should be in the "actual" possession. They express the belief that the policy of the act will be promoted, by requiring that the petitioner shall be actually in possession of some part of the premises, and seem to regard the case of *Clapp* v. *Bromagham* as declaring such to be the existing law.

The word "actual" was left out of the provision as adopted, but possession, actual or constructive of the moving party is

still required; and by section 16 it is a good plea, that the petitioners are not in possession of the premises or any part of them, or that the defendants did not hold the premises together with the petitioners, at the time of the commencement of the proceedings.

Possession usually follows the legal title when no adverse possession is shown, and consequently, when the lands are unoccupied, the possession will be deemed to be in those having the title (*Brownell* v. *Brownell*, 19 Wend., 369; *Beebee* v. *Griffing*, 14 N. Y., 235); and when one of several tenants in common is in possession, his possession will, in the absence of any act of ouster on his part, inure to the benefit of all.

But even the possession of one of the tenants in common, may become adverse by acts on his part amounting to an exclusion of his co-tenants; and, if he convey the whole of the premises to a third party, and the purchaser takes actual possession, claiming the whole, it is certain that the possession of such purchaser is adverse, and is not the possession of the former co-tenants of his grantor. (9 Cow., 562.) The moment such adverse possession commences, the holding in common is terminated, and until the excluded parties regain their possession by the appropriate action, I do not see how they can bring themselves within the provision of the statute or the rule of the common-law. It would be utterly incongruous to hold, that where ejectment would lie, the plaintiff has possession which would entitle him to bring partition. The duration of an adverse possession is material, upon the trial of the question of title in an action to recover possession; but it cannot be material in determining where the possession was at the time of the commencement of the action. These views are maintained in the cases of *Jenkins* v. *Van Schaack* (3 Paige, 242); *Burhans* v. *Burhans* (2 Barb. Ch., 398); and *Matthewson* v. *Johnson* (Hoff., 560), as well as by the reasoning of the chancellor in the case of *Clapp* v. *Brumagham*, before referred to.

In the case at bar, the respondent by her answer, sets up title in her father, Benjamin Florence, to the whole of the premises in controversy, a conveyance of the whole of the premises from him to her and her sister Mary Ann, subject to his possession during his life, and a conveyance from Mary Ann of her share, and avers, that by means of such conveyances, she (the respondent) became, and ever since has been, and is, the sole owner in fee of the premises sought to be partitioned, and denies that any of the parties to this action, except said respondent, have, or own, or are entitled to, the lands described in the pleadings, and now owned or possessed by her, or any estate or interest therein; and she denies the plaintiff's right to the relief asked for. These averments constitute a sufficient denial of a holding in common, and without regard to the questions raised as to the title and possession of Benjamin Florence, they constitute, if sustained by proofs, an insuperable bar to this action.

The conveyances were duly proved, and are found by the referee. The respondent testified on the trial, that she and her sister Mary Ann had possessed the farm, and claimed to own it, from the time of her father's death, which happened in September, 1865, until Mary Ann deeded to her, September, 1866, and that she had lived there ever since. The referee finds, that the defendant Euphemia and her grantor have been in possession of the property since the year 1828, claiming to be the owners in fee under the deed from Minott Mitchell and wife to Benjamin Florence; and he also sets forth in his findings the conveyance from Benjamin Florence, and from Mary Ann Florence to Euphemia.

It is not necessary to examine the correctness of the decisions of the referee, in regard to the possession and title of Benjamin Florence. A subsisting adverse possession by Euphemia, at the time of the commencement of the action is clearly established; and though of comparatively short duration, it is sufficient to bar this action, and sustain the referee's conclusion dismissing the complaint. This result could not be varied by any disposition, which might be made of the

other questions raised in the case; and the judgment should, therefore, be affirmed with costs.

All concur but CHURCH, Ch. J., not voting

Judgment affirmed.

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LEWIS SUNDERLIN et al., Respondents, v. HENRY BRADSTREET et al., Appellants.

The proprietors of a mercantile agency engaged in collecting and publishing for circulation among all its patrons, information as to the standing and financial credit of merchants and traders, are liable for a false report thus disseminated, injurious to the credit of the subject of it, although made in good faith and upon information deemed reliable.

Such a communication is privileged, only when it is confined to those having an interest in the information.

The fact that the libelous communication was in cipher, understood by the subscribers only, does not affect the liability.

(Decided September 7th, 1871.)

APPEAL from judgment of the late General Term of the seventh judicial district, entered upon order denying motion for new trial, and directing judgment on verdict in favor of plaintiffs.

The plaintiffs were merchants, doing business in the city of Rochester. The defendants were the proprietors of a mercantile agency. They published a semi-annual volume, containing the names of persons and firms doing business in various parts of the United States and Canadas, and information in reference to their financial credit. They also published what they called a weekly sheet of corrections, which was sent to their subscribers in the city of New York by private messenger, and in the country by mail. About ten thousand copies of their semi-annual volume, and between three and four thousand copies of their weekly sheet are so distributed.

In this weekly sheet, under the date of January 31st, 1868, they published that the plaintiffs had failed. This was con-

fessedly false. The plaintiffs called upon the defendants, for the names of the parties furnishing the information, which they refused to give, but published the next week a retraction of the report complained of.

The jury found a verdict for plaintiff for $400. Case and exceptions ordered to be heard at first instance at General Term.

Delavan F. Clark, for appellants. That, if the communication was privileged, the action is not maintainable without proof of express malice. (*Harris* v. *Thompson*, 24 Eng. L. & E., 370; *Fowles* v. *Bowen*, 30 N. Y., 20.) The communication was privileged. (Cur., per CAMPBELL, 2 Ch. L., in *Harrison* v. *Bush*, 5 Ell. & Bl. Q. B., 348; *Van Wyck* v. *Aspinwall*, 17 N. Y., 198; SELDEN, J., in *Lewis & Herrick* v. *Chapman*, 16 id., 369; PARKE, B., in *Toogood* v. *Spyring*, 1 Cromp., Mees. & Rosc., 193; *Goldstein* v. *Foss*, 2 Car. & P., 252; S. C., 6 B. & C., 154; *Gettings* v. *Foss*, 3 Car. & P., 160; *Fleming* v. *Newton*, 1 H. L. C., 379; *Fowles* v. *Bowen*, 30 N. Y., 20; note to *Wyatt* v. *Gore*, Holt's N. P., 299; Townsend on Slander and Libel, § 239; *Billings* v. *Russell & Waters*, Boston Law Reporter, vol. 8, N. S., 669; *Ormsby* v. *Douglass*, 37 N. Y., 477, overruled, *Taylor* v. *Church*, 8 id., 452.) A person, believing himself possessed of knowledge, which if true, *does* or may affect the rights and interests of another, may communicate it to that other. (Townsend on Libel and Slander, § 241; 2 Greenl. Ev., § 421.) Liberty of publication is permitted to the extent of the exigencies of society and business. (*Parsons* v. *Surgey*, 4 Foster & Fin., 248, and note; *Toogood* v. *Spyring*, 1 Cromp., M. & Rosc., 181; *Taylor* v. *Hawkins*, 16 Adol. & Ellis, N. S., Q. B. R., 308; *Lawless* v. *Anglo-Egyptian Cotton and Oil Co.*, Law Rep., 4 Q. B., 262; *Fleming* v. *Newton*, 1 House Lords Cas., 379; *Gassett* v. *Gilbert*, 6 Gray, 94.)

W. F. Cogswell, for respondents. The communication was not privileged. (*Taylor* v. *Church*, 8 N. Y., 452.)

ALLEN, J. The only question presented by the appeal, has respect to the character and occasion of the publication of the alleged libel, and is, whether the circumstances and occasion of the publication were such as to absolve the defendants from liability, in the absence of proof of express malice; that is, whether it is within the protection of privileged communications.

We might properly decide this question upon the authority of *Taylor* v. *Church* (4 Seld., 452), in which this precise question was determined by a unanimous court, seven judges taking part in the decision, the other judge refraining from expressing an opinion, for the reason that he was not present at the argument.

The point was made upon the trial of the action, and presented by counsel upon the appeal in this court, and was material to be decided for the guidance of the court below, upon a re-trial which this court ordered, inasmuch as, if the publication was privileged, it would probably be fatal to the plaintiff's cause of action; and the court, by a deliberate and formal resolve, adjudged that the alleged libel was not a privileged communication. The circumstances under which this judgment was given, as well as the method adopted by the judges in determining this precise question by a formal declaration, entitle the decision to peculiar weight as an authority. That case cannot be distinguished from this in any circumstance favorable to the defendant.

The decision, as abstracted by the reporter, was that "one who undertakes, for an association of merchants in New York, to ascertain the pecuniary standing of merchants and traders residing in other places, who are customers of some of the members of the association, and who furnishes reports to all the members of the association, irrespective of the question, whether they have an interest in the question of the standing of such merchants and traders, is liable for any false report made by him prejudicial to the credit of the subject of it, although made honestly, and from information upon which he relied."

In the case before us, the defendants were in no sense the agents of an association of merchants, or of their patrons. Of their own volition, and for their own profit, they established a bureau for collecting and disseminating information as to the character, credit, and pecuniary responsibity of merchants and traders throughout the United States. The business is in the nature of an intelligence office; and it is not intended by this to intimate, that it is not an entirely lawful and reputable business; or that it is not of general utility, or perhaps, a necessity to the commerce and business of the country. All may be conceded that is claimed for it by its friends; but in its conduct and management it must be subjected to the ordinary rules of law, and its proprietors and managers held to the liability which the law attaches to like acts by others. The information acquired by them was their own, and was communicated to others, or made public in such form and upon such terms as the defendants dictated.

In the established course of their business, they communicated with their patrons by means of semi-annual publications, with weekly corrections printed and furnished to each. The number of copies of each publication being about 10,000, distributed to every part of the country among merchants, bankers, and traders.

The alleged libel was published in one of the weekly corrections of the regular semi-annual publications, and was thus extensively circulated. Its distribution was general among all the subscribers to the defendants' publication, irrespective of their interest in the question of the plaintiffs credit and standing.

Whether a libel or slander is within the protection accorded to privileged communications, depends upon the occasion of the publication or utterance, as well as the character of the communication. The party must have a just occasion for speaking or publishing the defamatory matter. A communication is privileged within the rule when made in good faith, in answer to one having an interest in the information sought; and it will be privileged if volunteered when the

party to whom the communication is made has an interest in it, and the party by whom it is made, stands in such relation to him as to make it a reasonable duty, or at least proper that he should give the information. (*Todd* v. *Hawkins*, 8 C. & P., 88; *Cockayne* v. *Hodgkisson*, 5 C. & P., 543; *Washburn* v. *Cook*, 3 Den., 110, per SELDEN, J.; *Lewis* v. *Chapman*, 16 N. Y., 369.) It is not necessary to go farther in this case; and it may be assumed that if any one having an interest in knowing the credit and standing of the plaintiffs, or whom the defendants supposed and believed had such interest, had made the inquiry of the defendants, and the statement in the alleged libel had been made in answer to the inquiry in good faith; and upon information upon which the defendants relied, it would have been privileged. This was the case of *Ormsby* v. *Douglass* (37 N. Y., 477.) The business of the defendant in that action was of a similar character to that of the present defendants; and the statement complained of was made orally, to one interested in the information, upon personal application at the office of the defendant, who refused to make a written statement. There was no other publication, and it was held, that the occasion justified the defendant in giving such information as he possessed to the applicant. *Taylor* v. *Church* was referred to as authority for the rule, and so far from being overruled or questioned, was affirmed. The decision in *Taylor* v. *Church* was placed upon the ground, that the alleged libel was printed by the procurement of the defendant, and distributed by him to persons having no special interest in being informed of the condition of the plaintiffs' firm.

In the case at bar, it is not pretended that but few, if any, of the persons to whom the 10,000 copies of the libelous publication were transmitted, had any interest in the character or pecuniary responsibility of the plaintiffs; and to those who had no such interest, there was no just occasion or propriety in communicating the information. The defendants, in making the communication, assumed the legal responsibility which rests upon all who, without cause, publish defamatory matter

of others, that is, of proving the truth of the publication, or responding in damages to the injured party.

The communication of the libel, to those not interested in the information, was officious and unauthorized, and therefore, not protected, although made in the belief of its truth, if it were, in point of fact false. When a communication is made in the discharge of some public or private duty, the occasion prevents the inference of malice which the law draws from unauthorized communications, and affords a qualified defence, depending on the absence of malice. (*Toogood* v. *Spyring*, 1 C., M. & R., 181; *Fowles* v. *Bowen*, 30 N. Y., 20.) There has been no diversity in the utterances of judges and courts upon the subject, but all have spoken one language. (See 5 Blatch. C. C., 498.)

In those cases in which the publication has been held privileged, the courts have held that there was a reasonable occasion or exigency, which for the common convenience and welfare of society, fairly warranted the communication as made. But neither the welfare nor convenience of society will be promoted, by bringing a publication of matters, false in fact, injuriously affecting the credit and standing of merchants and traders, broadcast through the land, within the protection of privileged communications. The principle of *Taylor* v. *Church* is recognized in all the cases. (*Harris* v. *Thompson*, 13 C. B., 333; *Van Wyck* v. *Aspinwall*, 17 N. Y., 190; *Harrison* v. *Bush*, 5 E. & B., 344; *Goldstein* v. *Foss*, 6 B. & C., 128; *Getting* v. *Foss*, 3 C. & P., 160.) The fact that the libelous statement was in cipher is not material. It was in language understood by the numerous patrons of the defendants and all the subscribers to the publications. They had the key to the cipher, and the publication was equally significant and injurious as if made in the distinct terms, in the very words, indicated by the numeral figures used.

The judgment should be affirmed.

All concur.

Judgment affirmed.

46 194
109 141
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166 107

Dennis McCarthy et al., Respondents, *v.* The City of Syracuse, Appellant.

When the duty is imposed by law upon a public officer or municipal corporation, of keeping a structure in repair, it involves the exercise of a reasonable degree of watchfulness, in ascertaining the condition of such structure from time to time; and where this is omitted, such officer or corporation is liable for damages, resulting from a dilapidation of the structure, which is an ordinary result of its use, and which would have been disclosed by an examination.

No notice of the defect is necessary in such a case to fix the liability.

The owner of the land over which a street or highway passes, has a right to excavate the soil under the surface, and to use the space, so long as he does not interfere with the public right of way.

(Argued April 19th, 1871; decided September 15th, 1871.)

Appeal from judgment of the late General Term of the fifth judicial district, affirming a judgment entered in Onondaga county upon the report of a referee in favor of plaintiffs.

The plaintiffs occupied a store at the corner of Salina and Fayette streets, in the city of Syracuse. The basement room which extended out under the sidewalks was used for the storage and sale of carpets.

Prior to the year 1864 the common council of the city of Syracuse caused a sewer to be constructed in Fayette street. Into this main sewer ran branch sewers.

On the 13th day of August, 1864, there occurred at Syracuse a very heavy fall of rain, and the branch sewer running from the north-east corner of Salina and Fayette streets, became unable to receive and carry off the water which ran into it, and in consequence, the water set back and flooded those streets at that point, and ran under and forced up the floor of the basement room of the plaintiffs, and carrying with it mud, gravel, and street filth; wet and soiled a portion of the carpets stored in such room, and injured and damaged the same to the amount of $1,402.

This branch sewer had become obstructed by the falling down of a portion of bricks, of which the inlet to it was con-

structed, and the accumulation thereon of mud and street filth thus almost entirely closing the inlet.

None of the officers of the city of Syracuse had notice on the 13th day of August, 1864, or before that time of the obstruction; but the same might have been discovered on inspection.

By the charter of the city of Syracuse, it was made the duty of the mayor and common council of said city, and they had the power to make, open, regulate, repair, and improve sewers in said city; and during the year 1864 they appointed and employed a competent street superintendent and competent deputies under him, to take care of the streets and sewers of said city and keep them in repair.

D. Pratt, for appellant. That defendant was not liable for failure to construct a sewer of sufficient capacity. (*Mills* v. *Mayor of Brooklyn*, 32 N. Y., 489; *Wilson* v. *Mayor of N. Y.*, 1 Denio, 595.) Defendant not liable without notice, actual or constructive. (Shearman & Redfield on Negligence, § 147; *Hart* v. *Brooklyn*, 36 Barb., 226; *McGinity* v. *New York*, 5 Duer, 674; *Mayor* v. *Sheffield*, 4 Wal., 189; *Griffin* v. *New York*, 9 N. Y., 456; *Hudson* v. *Same*, id., 163.) Plaintiffs' excavation of the street was a wrongful act, which contributed to the injury. (*Congreve* v. *Smith*, 18 N. Y., 79; *Same* v. *Morgan*, id., 84; *Dygert* v. *Schenck*, 23 Wend., 446.)

George N. Kennedy, for respondents. Defendant was liable for the defect in the sewer. (*Barton* v. *City of Syracuse*, 37 Barb., 292; S. C., 36 N. Y., 54; see, also, *Davenport* v. *Ruckman and the City of New York*, 37 id., 568.) Plaintiffs had a right to use the area under the sidewalk. (*Williams* v. *Kenney*, 14 Barb., 629; *Cortelyou* v. *Van Brunt*, 2 Johns., 357; *Jackson* v. *Hatherway*, 15 id., 447; *Town of Galen* v. *R. Plank R.*, 27 Barb., 543.) The owner may make any use of the land not amounting to a nuisance. (*People* v. *Cunningham & Harris*, 1 Denio, 524.) Notice that sewer was

out of repair not necessary. (*Barton* v. *Syracuse*, 36 N. Y., 58; *Griffin* v. *Mayor, etc.*, 9 id., 465.)

Rapallo, J. The principle appears to be settled in this State, that where a duty of a ministerial character is imposed by law upon a public officer or corporation, a negligent omission to perform that duty, creates a liability on the part of such officer or corporation, for the damages which individuals may sustain by reason of such omission, and that such liability may be enforced in a civil action by the party injured. (*Adsit* v. *Brady*, 4 Hill, 630; *Robinson* v. *Chamberlain*, 34 N. Y., 389; *Hutson* v. *The Mayor, etc.*, 9 id., 169; *Fulton Fire Ins. Co.* v. *Baldwin*, 37 id., 648; *Hover* v. *Burkhoof*, Ct. Ap. Com.; *Barton* v. *City of Syracuse*, 36 N. Y., 54.)

The charter of the city of Syracuse, which was in evidence on the trial of this action, contains provisions making it the duty of the mayor and common council to make, open, regulate, repair and improve sewers in said city; and it is found by the referee, that at the time of the injury, they employed a superintendent and deputies to take care of the streets and sewers, and keep them in repair.

It was decided, in the case of *Barton* v. *The City of Syracuse* (36 N. Y., 54), that if the city entered upon the performance of this duty, negligence in its performance, created a liability to the party injured, and the city was in that case, held liable for damages sustained by a party whose property was injured by the overflow of a sewer, caused by an accumulation of mud and filth.

The entire omission to construct a sewer, or the failure to make it of sufficient size, has been held not to create a liability on the part of the city, for the reason that the duty of determining where sewers shall be located and their dimensions is, in its nature, judicial. (*Mills* v. *The City of Brooklyn*, 32 N. Y. R., 489.) But where a sewer has been determined upon and is constructed, all the authorities agree, that the duties of constructing it properly and keeping it in good condition and repair are ministerial; and that negli-

gence in the performance of those duties, will render the city liable for damages resulting therefrom. (32 N. Y., 489; 1 Denio, 595; 36 N. Y., 54.)

The referee has found as facts, that the plaintiffs' premises were flooded and his goods damaged, in consequence of the inability of the sewer in question, to carry off the water which fell in the street during a heavy rain, and that this inability of the sewer, resulted from its having become obstructed by the falling down of a portion of the bricks of which the inlet was constructed, and the accumulation upon such fallen bricks of mud and street filth, almost entirely closing the inlet; and that the defendant was guilty of a neglect of duty in permitting the sewer to become obstructed and out of repair; and that by reason of such negligence the plaintiffs sustained the damages for which judgment was rendered.

This finding of a neglect of duty on the part of the city officials is essential to the plaintiffs' case. Although the duty under a city charter of keeping sewers and other constructions in repair, may in one sense, be regarded as founded upon a contract implied from the acceptance of the benefits of the charter, to perform the duties imposed by the same instrument, yet the obligation has not, in any of the cases, been extended beyond that of exercising due diligence. No case has gone so far as to hold, that there is an absolute undertaking or guaranty on the part of the corporation, that these constructions shall at all times and under all circumstance be in proper condition, or to hold the city responsible without some wrongful act or negligent omission on its part. The appellant contends, that the uncontroverted facts establish, that in this case there was no such negligence, and they rely mainly upon the fact found by the referee, that none of the officials of the city had notice that the sewer was obstructed or out of repair.

The mere absence of this notice does not necessarily absolve the city from the charge of negligence. Its duty to keep its sewers in repair, is not performed, by waiting to be notified by citizens that they are out of repair, and repairing them only when the attention of the officials is called to the damage

they have occasioned by having become dilapidated or obstructed; but it involves the exercise of a reasonable degree of watchfulness in ascertaining their condition, from time to time, and preventing them from becoming dilapidated or obstructed. Where the obstruction or dilapidation is an ordinary result of the use of the sewer, which ought to be anticipated and could be guarded against by occasional examination and cleansing, the omission to make such examinations and to keep the sewers clear, is a neglect of duty which renders the city liable. (*Barton* v. *The City of Syracuse*, 37 Barbour, 292; affirmed 36 N. Y., 54.)

But it is further claimed in this case by the appellant, that the obstruction was caused by the falling in of the bricks, of which the inlet was built, and that these bricks must have fallen in during the extraordinarily heavy rain which resulted in the damage in question, or during a shower which occurred a few hours previously and on the same day.

The referee has not found, nor does the evidence disclose with certainty when this falling in occurred. It is argued from the fact that during the first shower no water came into the plaintiffs' premises, that the sewer was then in good order.

But that is not a necessary sequence. The sewer may have been then partially obstructed, but still have had sufficient capacity to carry off the water which fell at that time, or enough of it to protect the plaintiffs' premises. The street had been flooded in previous rains without injury to the plaintiffs. Neither was it shown that this falling in of the bricks was not caused by some negligence in the construction of the sewer. If the appellants had shown, that the sewer was constructed in a workmanlike manner, and that care had been exercised to keep it in proper order, and that, notwithstanding this care, it had caved in, then their want of notice of the injury in season to repair it would have excused them, and this court would be justified in reversing the finding of negligence.

But nothing was shown as to the mode of construction of the sewer, nor was it proved that any examination of it had

ever been made since it was built. How long it had been falling into the condition in which it was finally found, or from what cause it became so dilapidated, are left to conjecture. The referee has found, that the obstruction might have been discovered on inspection, and that the city was negligent in permitting the sewer to become obstructed and out of repair; and although it may be that the evidence would have justified a different conclusion, we do not think the case sufficiently clear to authorize us, to reverse the finding of the referee, on the ground that there is no evidence to sustain it.

The excavation by the plaintiffs of the area under the sidewalk was not unlawful; they owned to the center of the street, subject to the right of way of the public over the surface. For any interference with this right of way, the plaintiffs would have been responsible. But, so long as they did no injury to the street, they were at liberty to use the space under it, as they might any other part of their property.

They were not bound to leave the earth there, as a protection against a possible overflow of the sewer.

The question, whether the damage was caused by the stoppage of the sewer, was one of fact. There was evidence from which that inference could be drawn; and we cannot review the conclusion of the referee in that respect.

The judgment should be affirmed, with costs.

Church, Ch. J., Allen and Peckham, JJ., concur; Grover and Folger, JJ., dissent; Andrews, J., not voting.

Judgment affirmed.

PHEBE W. MEDBURY, Respondent, *v.* ISAAC W. SWAN, Appellant.

The word "may" in section 177 of the Code is permissive, not mandatory; and the right to set up new matter by supplemental pleading, is not absolute, but is within the discretion of the court.

An order therefore, denying such right is not appealable to this court.

Laches in making an application for leave to plead a discharge in bankruptcy, is a sufficient ground for denying it.

(Argued September 5th, 1871; decided September 8th, 1871.)

APPEAL from order of the General Term, first department, affirming order of Special Term, denying defendant's application for leave to serve a supplemental answer, setting up his discharge in bankruptcy.

This action was commenced in January, 1867, the complaint alleging an indebtedness to one Arnold Medbury, deceased, a settlement of that indebtedness by the defendants with the administrator of the estate of the deceased, and an assignment of the debt to the plaintiff.

The defendant, Isaac W. Swan, appeared and answered in February following. The cause has never been noticed for trial, and nothing has been done therein since the issue joined.

In August, 1867, defendant Swan filed his petition in bankruptcy, in the district court of the United States for the northern district of New York, and on the 5th day May, 1868, obtained in the said court the usual discharge from his debts. His attorney, Mr. Rathbun, in the summer of 1869, applied to the plaintiff's attorney for permission to interpose a supplemental answer, setting up the discharge. The request was taken under advisement, and in the mean time it was agreed that if said Swan should thereafter make an application to the court for such permission, no objection would be urged against the same, on the ground of delay thereafter. The matter thus rested until the 23d of November, 1869, when Mr. Perry, the plaintiff's attorney, advised Swan's attorneys, that he would no longer continue the promise.

The defendant's attorneys immediately communicated with Swan, who was then out of the city; and after his return, prepared and served the papers, for the motion for leave to Swan to serve his supplemental answer setting up his discharge.

H. Z. Hay, for appellant. That plaintiff's consent to delay cured all previous laches. (*Hall et al.* v. *Gordon*, 1 How. Pr. R., 99; *Center* v. *Gosling*, 1 How. Pr. R., 210; *Carter* v. *Goodrich*, 1 How. Pr. R., 239.) The question as to effect of discharge cannot be tried on motion. (*Reed* v. *Gordon*, 1 Cow., 50; *Baker* v. *Taylor*, id., 165; *Noble* v. *Johnson*, 9 John., 259; *Russell* v. *Packard*, 9 Wen., 431; *Smith* v. *Paul*, 20 How. Pr. Rep., 97; *Rich* v. *Salhinger*, 11 Abbt., 344; *Stewart* v. *Salkinger*, 14 Abbt., 291.) The demand for which the action was brought is not of a judiciary character. (*Duquid et al.* v. *Edwards et al.*, 32 How. Pr. R., 254; *Chapman* v. *Forsyth*, 2 How. U. S. R., 202; *Stoll* v. *King*, 8 How. Pr. R., 300; See *Smith* v. *Edmonds*, 1 Code Reporter, 86; *White* v. *McAllister*, id., 106; *Metzgar* v. *Karst*, 5 N. Y. Legal Ob., 49; *Angus* v. *Dunscomb*, 8 How. Pr. Rep., 14; *Goodrich* v. *Dunbar*, 17 Barbour, 644; *Bussing* v. *Thompson*, 15 How. Pr. Rep., 97.)

A. J. Perry, for respondent. That upon the application the merits of the proposed answer should be examined. (*Morel* v. *Garelly*, 16 Abb., 269.) The application was properly denied. (*Hubbell* v. *Caulp*, 11 Paige, 310; *Gannon* v. *Keenan*, not reported; *Cutter* v. *Taylor*, 1 Sandford, 593.) The debt sued on was not affected by the discharge; section 33 of the bankrupt act of 1867. (*Whitaker* v. *Chapman*, 3 Lansing, 155.)

ALLEN, J. An appeal is allowed to this court from an order "affecting a substantial right not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action." (Code, § 11, sub. 4.)

By statute, the defendant may, by leave of the court, granted

upon motion, make a supplemental answer, alleging facts material to the case, occurring after the former answer was put in. (Code, § 177.)

The right to allege new matter, by supplemental pleading, is not an absolute and positive right, but is made to depend upon the leave of the court, in the exercise of a legal discretion. The application may be refused, if the new defence, although strictly legal, is inequitable, or if the application is not made with reasonable diligence. A party may waive his right altogether, or lose it by laches. (*Hoyt* v. *Sheldon*, 6 Duer, 661; S. C., 4 Abb., 59.) In one case, decided at Special Term, it was said that the word "may," in the statute permitting supplemental pleadings, should be read as "must," and that it was not material that the application for leave should be made at the earliest practicable day. (*Dwight* v. *Curtiss*, 8 How., 56.) The remark was not necessary to the decision; and I am not aware that the dictum has been followed or approved in subsequent cases. The word "may," according to its ordinary construction, is permissive, and should receive that interpretation, unless such a construction would be obviously repugnant to the intention of the legislature, to be collected from the terms of the act, or would lead to some other inconvenience or absurdity. The word may, in a statute, means must or shall, in those cases where the public are interested, and the public, or third persons, have a claim *de jure* to have the power exercised. (*P. D. and Co. of Newburgh, etc., T. Co.* v. *Miller*, 5 J. C. R., 101.) Chancellor KENT, in the case referred to, says the word has such meaning only in the cases mentioned. By an English statute it was enacted that, if certain matters should be made to appear to the satisfaction of the court, in which certain actions were brought, or of a judge at chambers on summons, the court or judge "may thereupon, by rule or order, direct that the plaintiff shall receive his costs;" and it was held that the statute left the matter discretionary with the court, and was not compulsory. (*Jones* v. *Harrison*, 6 Exch., 327; *Latham* v. *Spedding*, 20 L. I., N. S., 2 B., 302.) Had the legislature intended

to confer an absolute right upon the party, it would not have required the idle ceremony of an application to the court for leave, but would have permitted the supplemental pleading to have been served of course. The statute would have conferred the right absolutely by appropriate words. (See *Minor* v. *Mechanics' Bank*, 1 Pet., 64; *Malcom* v. *Rogers*, 5 Cow., 188; *King* v. *Corporation of Eyre*, cited in Smith's Statutes, etc., 726.)

The supplemental answer takes the place of the former plea *puis darrien* continuance; but it is not like that, a waiver of defences before interposed, and is not confined to matters arising since the last continuance. A plea *puis darrien* could not be rejected or treated as a nullity, because not pleaded in due time, or at the proper time; and could only be set aside upon application to the court; and the court in its discretion could permit the plea to stand. (Gra. Pr., 257, and cases cited.)

Delay in interposing the defence unexcused, was a reason for setting aside the plea; and delay in pleading an insolvent discharge, was regarded as sufficient to exclude the defence. (*Sandford* v. *Sinclair*, 3 Duer., 269; *Desobry* v. *Morange*, 18 J. R., 336; *Valkenburgh* v. *Dederick*, 1 J. C., 134.) Here issue was joined in the action in February, 1867. The discharge in bankruptcy was granted on the 5th of May, 1868, and no steps were taken to plead it, or suggestion made in respect to it until August, 1869, fifteen months after the discharge. Then the plaintiff's attorney said he would take no advantage of delay thereafter, assenting that the application when made should be treated as if made then. But there had already been a delay of fifteen months, and this was unanswerable, and there is no attempt to excuse it.

It is enough, that in this case after a delay of more than a year, the application to set up the discharge by supplemental answer, was addressed to the discretion of the court; and was not therefore, appealable to this court. The order of the court below was right, but for the reasons stated the appeal is dismissed with costs.

All concur. Appeal dismissed.

ROBERT DREW, Respondent, *v.* JULIUS S. SWIFT, Appellant.

Permanent and visible monuments, referred to in a deed, will control courses, distances, and quantity; but when the monument called for is not found, nor its location or existence proven, the lands must be located by the other parts of the description. And where the grant describes the premises by definite and distinct boundaries, from which the lands conveyed may be located, no extrinsic facts or parol evidence of intent can be resorted to, to control or vary the description.

In an action of ejectment against a grantee, holding under a deed which under the above rules gave him title to the *locus in quo*,—*Held*, that plaintiff was not entitled to recover upon proof of prior possession, other than an adverse possession for a period which would bar an entry, and that the admission of evidence of the statements and declarations of defendant, tending to vary the description was error.

(Argued February 10th, 1871; decided September 2d, 1871.)

APPEAL from judgment entered in Erie county upon order of the late General Term of the eighth judicial district, denying motion for new trial, and directing judgment upon verdict in favor of plaintiff.

This is an action of ejectment, brought to recover possession of certain lands situated in the town of Newstead, Erie county. The facts appearing upon the trial are sufficiently stated in the opinion. A verdict was rendered by the jury in favor of the plaintiff for part of the land claimed. Exceptions were directed to be heard at first instance at General Term.

L. L. Lewis, for respondent. That in construing a deed the intent of the parties must be considered. (8 How. U. S., 274; 3 Mass., 352.) Where one having title locates a line which is acquiesced in for a considerable length of time, it will not be disturbed. (*Rockwell* v. *Adams*, 7 Cow., 761; *Jackson* v. *Van Coslier*, 11 Johns., 128; *Jackson* v. *McConnell*, 12 Wend., 422; 3 Keyes, 513.) Defendant being a mere trespasser, plaintiff can maintain ejectment, even if he has no title. (2 Johns., 22; 4 id., 202; 10 id., 338; 16 id.,

325; 1 Cow., 613; 5 id., 202; 7 id., 637; 15 Wend., 171; 31 Barb., 511; 5 Duer, 130; 9 How., 232.)

William Dorsheimer, for appellant. That parol testimony to vary the effect of the deeds was improper. (*Van Wyck* v. *Wright*, 18 Wend., 157; *Linscott* v. *Fernald*, 5 Green., 496; *Bell* v. *Morse*, 6 N. H., 205; *Seaman* v. *Hogeboom*, 21 Barb., 598; *Clark* v. *Baird*, 5 Seld., 193.) Courses and distances control in a deed, calling for a monument which did not exist at the time deed was made. (*Seaman* v. *Hogeboom*, 3 Barb., 215; S. C., 21 id., 298; *Cudney* v. *Early*, 4 Paige, 209.) The court erred in charging, that plaintiff could recover without title by adverse possession or otherwise. (*Jackson* v. *Hazen*, 2 Johns., 22; *Jackson* v. *Hardee*, 4 id., 202; *Smith* v. *Lorillard*, 10 id., 338; *Jackson* v. *Camp*, 1 Cow., 605; *Jackson* v. *Walker*, 7 id., 637; *Schauber* v. *Jackson*, 2 Wend., 13; *Jackson* v. *Russell & Rowland*, 6 id., 666.) Defendant or his grantor had title; and defendant, entering with his grantor's consent, can set up the outstanding title. (*Jackson* v. *Seelye*, 16 Johns., 197; *Jackson* v. *Farmer*, 9 Wend., 201.)

ALLEN, J. It is agreed that the title to part of lot No. 84, in township No. 13, fifth range in the town of Newstead, Erie county, including the premises in controversy, was at one time, in one Heman Stone; and it was held, upon the trial, that it was still in him, unless he had conveyed it to the defendant. In October, 1849, Stone conveyed to the defendant a part of the lands then owned by him, described by metes and bounds; and the material question upon the trial was, whether the *locus in quo* was within the description. The plaintiff and defendant own lands adjoining the narrow strip in dispute; the defendant acquiring title under the deed from Stone, and both holding under and recognizing a common source of title. The plaintiff relied upon possession of the disputed territory, giving no proof of a conveyance from the original proprietor, or of any paper title; and he recovered upon the strength of such possession. The defence, so

far as it depended upon title, hinged upon the question of boundary. The plaintiff did not make title by adverse possession. At the time of the conveyance by Stone to the defendant, there was no survey or map made of the premises, and there is no reference in the description to any map or survey, except the original survey of the township into lots by the Holland Land Company, the original proprietors. About ten years before the conveyance to the defendant, and about the time Stone took title, and for his own convenience, he had caused a survey of his premises to be made, and his boundary lines to be run by one Trowbridge; but it did not appear that any sale or conveyance, of any part of the lands, was ever based upon such survey, or that it was in any way referred to, in any deed or grant of any portion of the lands surveyed.

The lands that Stone owned, and a part of which he conveyed to the defendant, were in the center and western part of lot 34, extending from the western boundary of the lot, easterly to the line of the lands now owned by the plaintiff, who is bounded on the east by the Tonawanda reservation, the eastern boundary of the lot. The deed to the defendant described the premises conveyed, as beginning at a point on the north line of Stone's (the grantor's) land, twenty-five chains seven links west of the east line of lot 34; running thence east seventy-five links to a post, on the east bank of the grist and saw-mill race; thence south twenty-eight degrees west nine chains thirty-three links; and prescribing courses and distances thence upon several lines to the place of beginning, and containing two acres and 102 rods of land, be same more or less. The post at the termination of the first line or corner, is the only monument referred to in the description, and that was the north-eastern corner of the granted premises, and twenty-four chains and thirty-two links from the east line of the lot, the plaintiff's eastern boundary. The question upon the trial as said by Judge MARVIN was, "where was the north-east corner of the two acres and 102 rods conveyed by Stone by the deed of October 4th, 1849?"

line of the Lawler lot, a part of the land owned by Stone, and by which the title to the narrow strip of land in question, had been adjudged to be in Stone. It was so ruled upon this trial, and is not controverted upon this appeal. It follows therefore, as suggested by the judge at the trial, that the question was, whether Stone had conveyed to the defendant. That must be determined by the deed. The grant describing the premises by definite and distinct boundaries, from which the lands conveyed may be located, must be followed and effect given to it according to its calls. The evidence establishes very clearly, that lines run, as directed, from the corner ascertained by actual measurement, and located at the prescribed distance from the eastern line of the lot, and of plaintiff's land as called for by the deed, will include the premises in controversy. This being so, the title to the *locus in quo* was in the defendant, and he was entitled to a verdict, and to retain the lands as within the boundaries of his grant. The defendant was not a trespasser, but went into possession having title, and the plaintiff was not therefore entitled to recover, upon proof of any prior possession, other than an adverse possession for a period which would bar an entry, and no such possession was shown. The defendant was entitled to a judgment upon the merits. There was also error in the admission of evidence.

Evidence was admitted upon the trial, of the admissions and statements of the defendant, as to the lines and boundaries of the divisions of the lot, and especially as to the lines of the Trowbridge survey, and the jury were charged that the evidence might be considered by them, for the purpose of fixing the line as laid down by Trowbridge. The grant to the defendant was not made in reference to that survey or the lines then laid down, but was made by clear and distinct descriptive boundaries, and assuming as we must that Stone was the owner of the premises, the description was not aided, and there was no ambiguity which could be remedied by reference to that survey. The declarations of the defendant, or other parol evidence, could not be resorted to, to vary the

terms or aid in the interpretation of the deed. There was no ambiguity in the langage of the instrument. The description begins at a point capable of being ascertained, and runs thence by courses and distances well defined; and no extrinsic evidence, tending to explain the intention of the parties, and thus give effect to the deed different from its terms, was allowable. A deed cannot be contradicted, varied or explained by parol evidence. Where there are no monuments, or if monuments once existing are gone, and the place where they originally stood cannot be ascertained, the courses and distances, when explicit, must govern, and cannot be controlled or affected by parol evidence. (*Linscott* v. *Fernald*, 5 Greenl., 496; *Bell* v. *Morse*, 6 N. H., 205; *Van Wyck* v. *Wright*, *supra*; *Clark* v. *Baird*, 5 Seld., 183; *Clark* v. *Wethy*, 19 Wend., 320.) It is distinctly declared in the cases cited, and others that might be referred to, that upon principle, when the description in the deed designates a piece of land as that conveyed, the description cannot be departed from, by parol evidence of intent, or of acquiescence in another boundary, unless such an adverse possession be shown as is, in itself, a bar to an action. (*Adams* v. *Rockwell*, 16 Wend., 285.) The evidence was admitted, and submitted to the jury, as relevant and competent; and it cannot be assumed that it did not influence the result. It brought to the minds and consideration of the jury, as relevant to the main issue, and as an aid in ascertaining the land conveyed, which was adequately described in the deed, extrinsic facts and circumstances not admissible within the well established rules of evidence. It is true that the declarations had respect to the line laid down by Trowbridge; but the jury were given to understand, that that line was material in determining the boundaries of the grant to the defendant. This like every other extrinsic fact, was inadmissible to control or vary the descriptions in the deed. It cannot be said that the evidence, and the instructions based upon it, were certainly innoxious. It would rather seem that they must have influenced the verdict. The admission of the evidence, and its submission to the jury, as proper

to be considered in determining the question submitted to them, was erroneous; and the judgment should be reversed and a new trial granted, costs to abide event.

All concur.

Judgment reversed.

JOHN ROSS, Respondent, *v.* GEORGE ACKERMAN AND JOHN W. BANTA, Appellant.

In an action where the defence is usury, evidence that plaintiff had loaned money at other times, prior to the transaction in question at usurious rates of interest, is inadmissible.

(Argued June 5th, 1871; decided September 5th, 1871.)

APPEAL by defendant, Ackerman, from a judgment of the Superior Court of the city of New York, affirming a judgment for plaintiff entered upon verdict. Action upon a promissory note for $800. Defence usury.

J. W. Culver, for appellant. Usury is a crime; and evidence of other transactions of a similar character is admissible. (Russell on Crimes, vol. 2, pp. 776, 777, 778; Phil. Ev., vol. 1, p. 179, 2d ed.; Starkie Ev., p. 221, 6th Am. ed.; *Hall* v. *Taylor*, 18 N. Y., 588; *Amsden* v. *Manchester*, 40 Barb., 158; *Meyer* v. *Goedel*, 31 How. Pr., 456; *Hawthorne* v. *Hodges*, 28 N. Y., 486; *Read* v. *People*, 42 N. Y., 270, 280, 282.)

F. A. Paddock, for respondent. Usury in one transaction cannot be established by showing usury in others. (*Jackson* v. *Smith*, 7 Cow., 717; *Keutzen* v. *Parks*, 2 Sandf., 60; *Brinckerhoff* v. *Foote*, 1 Hoffman Chy. R., 291.)

By the Court—PECKHAM, J. The defendant insists that the court erred, in overruling a great many questions put and several offers to prove facts.

Several questions and offers proposed to prove that Reuben Ross, Jr., a brother of the plaintiff, had loaned money at different times, prior to this transaction at usurious rates of interest.

This testimony was properly excluded. Even if Reuben were the real plaintiff, the testimony was inadmissible. Usury in the discount of this note, could not be proved, by showing that the plaintiff had taken usury upon other notes.

If the offer were made with a view to impeach the witness, the counsel should have called the attention of the court to that purpose. So of the offer on the cross-examination of Reuben Ross, Jr. As a general rule, the extent of a cross examination is much in the discretion of the judge, yet it should be liberally allowed. In a clear case of its abuse, a new trial should be granted.

The offer of the defendants' counsel, to prove what Banta, the payee of the note, told Ackerman that Reuben Ross had said, was properly excluded. It was incompetent to prove usury against plaintiff, by the declarations of Banta in plaintiff's absence.

The offer to show that the witness, Reuben Ross, Jr., had endeavored to settle this controversy before or after suit, upon very liberal terms, and conversations of that character with the defendant, should have been received. They were at first rejected, but were finally received and substantially stated in full.

The offer to prove by Winans, what Reuben Ross, Jr., had proposed to do, as to borrowing for or loaning money in other cases for other persons, was properly excluded.

The judgment is affirmed.

All concur. Judgment affirmed.

LEMUEL L. CROCKER, Respondent, *v.* HIRAM COLWELL, impleaded with ABEL B. DIMMICK, Appellant.

When the bank account of a firm is kept in the name of one of its members, and all checks are drawn in his name, with the knowledge and assent of the others, the firm is liable upon a check thus drawn in its business.

In an action upon such a check, it is pertinent for plaintiff to show affirmatively, that the money was not advanced by him upon the individual security of the partner, whose name is signed to the check.

Where an advance is made in one place, upon a check drawn upon a bank in another, no question of usury can arise out of the transaction, as there is no loan or forbearance of money for any time whatever.

(Argued June 14th, 1871; decided September 5th, 1871.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court of the eighth judicial district, entered upon a verdict. Exceptions ordered to be heard at first instance at General Term.

The action is to recover $5,800 and interest, being part of the amount of a check, of which the following is a copy:

"NEW YORK, *March 26th*, 1867.

"*The People's Bank*,

"Pay to the order of W. S. Holmes, six thousand eight "hundred dollars.

"$6,800. O. B. DIMMICK."

Indorsed: "W. S. Holmes. "L. Crocker & Co."

Both defendants appeared and answered separately.

The second trial, which is now under review, was between the plaintiff and the defendant, Hiram Colwell, only.

The defendant, Hiram Colwell, sets up two defences. 1st, usury; and 2d, that the check is not the obligation of the firm of Colwell & Dimmick, but is the individual obligation of Obed B. Dimmick.

The plaintiff lived in Buffalo. He was engaged in the banking business individually, at the cattle yards, near

Buffalo. The defendants lived at Hudson City, in New Jersey, and were engaged as partners in the business of buying and selling cattle on commission, as brokers. They began this business in May, 1866, and continued it for one year. Soon after commencing their business, they began to purchase cattle on joint account with third parties, and sharing the profits and losses with them, instead of receiving commissions for their services.

In January, 1867, the defendants were engaged in the business of buying and selling cattle, with W. S. Holmes, the payee in the check, on joint account. His part of the business was to come to Buffalo and purchase the cattle, ship them by the Erie railway to Hudson city, in New Jersey, and see that they arrived there. The defendants' business was to receive the cattle and to sell them. The profits and losses were divided between them.

In the latter part of February, or fore part of March, 1867, the check in question and one other check were given, in blank, to Mr. Holmes to, go to Buffalo and purchase cattle under this arrangement. He went to Buffalo, purchased seventy-five head of cattle, filled up the other check for $4,000, and procured the money of the plaintiff, to pay for the cattle on that check.

On the 26th day of March, 1867, Mr. Holmes appeared again at the cattle yards in Buffalo to purchase some more cattle. He bought seventeen head and went to the plaintiff's office to procure money to pay for them, and to obtain money to buy other cattle. He there filled up the check in question. The plaintiff paid for the seventeen head of cattle.

Being	$1,658 57
Gave Holmes check for	5,000 00
Paid charges for feeding sheep	28 00
Gave Holmes in cash	96 43
Retained for exchange	17 00
Amount of check in question	$6,800 00

Statement of case.

The seventeen head of cattle were sent by the Erie railway to the defendants, and they received and sold them. Mr. Holmes purchased some sheep with a portion of the money, and the defendants received the profits. The defendants also received a draft of $1,000, being a part of the proceeds of the check in question.

The balance of the money over the $1,658.57 paid for the seventeen head of cattle, the draft of $1,000, the money paid for feeding the sheep, and the $96.43 paid to Mr. Holmes, he claims was stolen from his pocket on the cars, when he was going to purchase more cattle.

The defendants, in their firm financial matters, used the name of "O. B. Dimmick," as representing the firm. The bank account was kept, and the cattle were paid for in that name. All of their checks were given in this name. The defendant, Hiram Colwell, knew this. He assented to the check in question being given, and said it would be right.

D. F. Clark, for appellant. Where one partner gives his check for money, to be used for the firm, even with the knowledge and approval of the other partner, firm not liable. (Colyer on Part., §§ 474–478, and note; Lindley on Part., 100 Law Lib., 200 marg., also 29 Law Lib, 6th series; Story on Part., §§ 134–136; Parsons on Notes and Bills, 130, and note; *Coster* v. *Clark*, 3 Edw. Ch., 411; *Jaques* v. *Marquand*, 6 Cow., 497; *Le Roy* v. *Johnson*, 2 Pet., 186; *Emly* v. *Lye*, 15 East, 7; *Skiffkin* v. *Walker*, 2 Campb., 308; *Beavan* v. *Lewis*, 1 Simon, 376; *Green* v. *Tanner*, 8 Metc., 411; *Mead* v. *Tomlinson*, 1 Day, 148, and note.) The firm only made liable by use of firm name. (*Kirk* v. *Burton et al.*, 9 M. & W., 283.) The discount of the check was usurious. (*Oliver Lee & Co.'s Bank* v. *Walbridge*, 19 N. Y., 134; *Eagle Bank of Rochester* v. *Rigney*, 33 id., 613; *Price* v. *The Lynes Bank*, 33 id., 55.)

J. Ganson, for respondent. Upon the question of usury, the question of intent, in the reservation of exchange, was properly submitted to the jury. (*Thurston* v. *Cornell*, 38

N. Y., 281; *Valentine* v. *Conner*, 40 id., 248; *Merritt* v. *Benton*, 10 Wend., 116; *Ontario Bank* v. *Schermerhorn*, 10 Paige, 109; *Marvine* v. *Hymers*, 12 N. Y., 223; *International Bank* v. *Bradley*, 19 id., 245; *Farmers' and Mechanics' Bank of Genesee* v. *Parker*, 37 id., 140.)

By the Court—PECKHAM, J. The defendants in this case were partners, as cattle brokers, in the city of New York, at the time of giving the check in suit, the advance of money thereon, and also at the time of giving the draft described in the complaint, doing business in the firm name of "Colwell & Dimmick." The check in suit for $6,800 was drawn in the name of "O. B. Dimmick." The check was upon a bank in New York city, and the money was advanced thereon, deducting seventeen dollars or twenty dollars therefrom, for alleged exchange by the plaintiff in Buffalo.

I think there was sufficient evidence to carry the case to the jury, upon the question whether the firm did not do business in the name of "O. B. Dimmick," in giving checks. They had been in business nearly a year as a firm; and during all that time, the financial part of their business had been transacted by Dimmick alone. He had kept the moneys of the firm in the bank in his own name; had uniformly paid the bills and accounts of the firm in checks signed by himself, and as he said, with his copartner's knowledge and assent; that checks so signed, with the like knowledge and consent, had been delivered to one or more persons, to buy cattle for the firm, assented to by Colwell substantially as binding the firm; that the firm had been in the habit of making advances for the purchase of cattle, and always by checks in the name of Dimmick. The firm's money was always thus disbursed. Colwell attended to another branch of the business, viz., selling the cattle. A large part of the business of the firm, consisted in selling cattle purchased by one Holmes, and sometimes by others. This was done on joint account as to profit and loss by the firm and Holmes, and so as to some other parties at other times.

The firm of Colwell & Dimmick continued to do business, a little more than a month after Colwell became aware of the giving of this check, and was then dissolved.

Two checks in blank were given by Dimmick to Holmes, at the same time. From the testimony of Holmes and Dimmick, I should infer that these checks were given, to enable Holmes to purchase stock, to be shipped to the firm of Colwell & Dimmick, in New York, and sold by them on joint account for the three. One check was filled up for $4,000; was cashed by this plaintiff; and the stock therewith purchased by Holmes was shipped to New York, and was sold by Colwell & Dimmick on joint account of themselves and Holmes.

The doctrine seems to be settled, that where one of two partners draws bills of exchange in his own name, and procures their discount, and carries the proceeds to the partnership account, the firm are not liable to the discounter, the money being advanced solely on the security of the parties to the bills by way of discount, and not by way of loan to the partnership. (*Emly* v. *Lye*, 15 East, 7; and see Coll. on Part., Perk. ed., § 478, and cases cited in note 3.)

A partner of a firm has a right to contract in his own name, and to obtain credit upon his individual responsibility, although he may appropriate the proceeds to the partnership, and the persons with whom he may thus deal, have the right to trust him individually, and not the firm. In such cases the firm is not bound. But this rule does not apply to secret and dormant partnerships. (Same note and cases cited.)

In the case at bar, the firm kept no other bank account than that in the name of Dimmick. They drew no checks (as they thus could draw none) except in his name. This course of business was known to both partners, as one testified from the beginning, and the other, that he did not know of it until some six months had expired. But for months it had been known to him prior to this transaction. This is not like the case of *Faith* v. *Richmond* (11 Ad. & E., 339, in 39 Com. L. R., 113).

It cannot be denied that if the partners had expressly

agreed, that the firm should draw all checks in the name of Dimmick, and kept all their money in his name in bank, that the firm would be liable on a check thus drawn in their business. Yet where the facts as here authorize such an agreement to be implied, the liability is the same. In such case it is their partnership name for that purpose.

It is objected, that the court erred in admitting evidence of what was stated to the plaintiff, when he advanced the money on the check. If the evidence be not admissible, it is wholly immaterial. I think it pertinent to show affirmatively, that the plaintiff did not trust Dimmick alone, or advance the money upon his individual security, although perhaps in this case the evidence was unnecessary.

There is no usury in this case. There can be no such question under the facts. Here was no "loan or forbearance of money," for any time whatever. There was, therefore, no usury. Had there been a loan for any time I should have had no difficulty in seeing usury under facts like these, unless the statute on that subject be regarded as repealed.

Here it was shown that checks on New York were generally above, but never below par. It is not then, very important, to inquire what it will cost to send the check by express to New York and bring back the proceeds. The testimony is harmless here. The charge of the court was correct in the points assailed.

The request to charge, that the issuing of a blank check to a third person by a partner, is a fraud upon the other partner, does not apply to this case. Holmes can scarcely be considered a third person; that is, a stranger here. He was, in fact, a partner, and had been for months, in purchasing and selling cattle with these defendants. There was, positive testimony to that effect. The request when again presented, as applicable to the facts in this case, cannot be sustained as matter of law. Partners have great powers over partnership matters. They may easily ruin their copartners if they choose to be villains. They may do it in various ways. Greater reliance must always be placed upon the integrity of a copart

ner, than upon legal remedies to make him honest, though there is no evidence in this case of a lack of integrity on Dimmick.

All concur. Judgment affirmed.

JAMES H. HAMILTON et al., Respondents *v.* ELIZA H DOUGLAS, Appellant.

The defendant, a married woman, had been in partnership with H., owning half the stock in trade, and half the real estate occupied for the purposes of the business, which was carried on in the name of H. and herself, her husband acting as her agent. Defendant bought out her partner, and, with her knowledge, the business was subsequently carried on by the husband in his own name, without any control or interference by her: he taking possession of the assets of the firm, and using them in the business for his own benefit, until he failed, when he assigned the personal property for the benefit of creditors, without any claim thereto on the part of defendant.

Held, that the dissolution of the partnership was a revocation of the husband's agency, and her knowledge of the manner of conducting the business thereafter implied an assent, and would preclude her from deriving any benefit therefrom; and that a finding of the referee, that the business was defendant's, conducted by the husband as her agent, could not be sustained, either as a finding of fact or conclusion of law. Also, *held*, that necessary expenditures upon the real estate, not exceeding the amount of personal property received from the wife, were properly made, and for any excess, if claimed, the proper remedy was by creditor's bill for an accounting.

(Submitted June 22, 1871; decided September 5, 1871.)

APPEAL from judgment of the late General Term of the eighth judicial district, affirming a judgment entered in Niagara county in favor of plaintiff upon report of a referee.

On the 12th day of August, 1862, one Francis Hitchins was seized in fee of certain real estate, situate in the city of Lockport, with a glass factory thereon, and therein carried on the business of manufacturing and vending glassware. He conveyed to the defendant, Eliza H. Douglas, a married

woman, residing with her husband, William W. Douglas, at said city, in fee, one equal undivided half of the real estate, and one equal undivided half of the stock and materials on hand. And the said Hitchins and the defendant, by written articles of copartnership, then and there made, agreed thenceforth to carry on the said business as equal copartners, under the name, style and firm of "Hitchins & Douglas," and did so carry on the same until the 27th day of March, 1865; the husband of the defendant acting in her place and stead as her agent. On said last mentioned day, Hitchins conveyed his remaining undivided half of said real estate to the defendant, in fee, and, with the defendant, made and executed an agreement in writing, in and by which he sold and transferred to her, all his right and interest in and to all the personal assets and effects belonging to the copartnership, and in and by which she assumed and agreed to pay, as they should become due, all debts owing by the firm. From and after this last sale and transfer by Hitchins to the defendant, the business was carried on in the name of "W. W. Douglas," defendant's husband, he having the charge and management thereof, until the 31st day of January, 1866, when the same was suspended. While the business was so carried on, the plaintiffs, being merchants in the city of Lockport, accepted and paid in goods, drafts or orders, drawn in the name of "W. W. Douglas," on them. The drafts amounted, at the time of the commencement of this action, to the sum of $976.75.

This action was brought to recover the amount of said drafts.

The referee found, that the business of the glass factory during the time aforesaid, although conducted by the said husband of the defendant as aforesaid, was the business of the defendant, and was so conducted by him as her agent, and directed judgment in favor of plaintiff for $1,186.21 and costs.

Murray & Greene, for appellant. That no agency existed after dissolution of firm. (2 Kent Com., 611.)

Ely & Crowley, for respondents. That the court is bound by the facts as found by referee. (*Marco* v. *Liverpool and London Insurance Co.*, 35 N. Y., 664; *Doty and another* v. *Carolus*, 31 N. Y., 547; *Metcalf and Bull* v. *Mattisons*, 32 N. Y., 464.) There was no error in the reception of evidence. (*Porter* v. *Ruckman*, 38 N. Y., 210; *Morehouse* v. *Matthews*, 2 Coms., 514.)

CHURCH, C. J. The referee found that the business of the glass factory was, in fact, the business of the defendant, and was conducted by the husband as her agent. An examination of the evidence impressed my mind with a contrary conclusion. There is very little conflict of evidence, and the case must be determined, from the inference which ought to be drawn from conceded facts. Up to the period of the last sale of one-half of the property to the defendant, she was confessedly the owner of one-half the real estate purchased for her by her father, and the business was carried on in her name, and that of the owner of the other half of the real estate. When the purchase was made from the copartner of his half of the property and business, the whole belonged to her; but the business was then changed from her name to that of her husband, and he carried it on in his own name, without any control or interference from the defendant, and held out to the world that the business was his, and conducted for his benefit. It is true that he took possession of the personal property of his wife, which, together with the debts due the concern, he used in the business; but no one except the defendant could complain legally of this appropriation of her property. With her consent it was competent for the husband, to appropriate the assets and assume the liabilities of the late firm, and continue the business in his own name and for his own benefit. Neither existing nor future creditors could question this arrangement, because he received a considerable amount more than he assumed, and there was no deception in the manner of conducting the business.

The plaintiff in this action supposed, that the business was

carried on by the husband on his own account, and credit was given to him personally; and when the husband failed all the personal property, stock, and materials belonging to the business, were assigned by her husband for the benefit of his creditors and passed to the assignee, without any claim on the part of the wife. The circumstance, that the husband made some expenditures upon the real estate, is not inconsistent with the fact that the business was conducted for his benefit. The expenditures were deemed necessary for the benefit of the business, and his creditors could only complain of them, if they exceeded in amount the value of the personal estate received from his wife after paying existing liabilities. If he received $5,000 from his wife, and only expended that amount upon her property, the rights of the creditors were not affected in any degree; and if he expended a greater amount, so as to give the creditors an equitable right to the excess, the proper remedy was by creditors' bill for an accounting.

This as it appears to me, was the real nature of the transaction; and the only embarrassment I have in deciding the case in accordance with these views, arises from the conclusive character of findings of fact by a referee or jury upon this court. The rule is, that if there is any evidence to sustain the finding, this court cannot interfere with it, although we might arrive at a different conclusion.

The referee, in the first place, finds that the husband carried on the business in his own name, as though it was his own, with the knowledge of his wife, but without any agreement or contract with her or with any one authorized to act for her; and then finds that the business was, in fact, the defendant's, and conducted by the husband as her agent. I infer that the learned referee intended by these two findings to hold, that because there was no agreement by the wife, or any one in her behalf, that the husband should conduct the business as his own, therefore, as she owned the business at the time and had not agreed to any change, it remained, in fact, her business, and the husband must be deemed her agent.

This conclusion is not legitimate. The *onus* was upon the plaintiff. When the last purchase was made, the right of the husband to act as agent ceased. That was an agency for the old firm, and the dissolution of the firm was a revocation of the agency. If the husband had, in fact, continued to act as agent, the consent of the wife would have been presumed; but he confessedly did business for himself, and there is no conflict of evidence upon this point. When the husband changed the mode of doing business, by substituting his own for his wife's name, and bought and sold upon his own credit, and in all respects conducted the business as his own, her knowledge of all these facts implied an assent on her part, that her husband should thus conduct the business, and would preclude her from afterward claiming any benefit from it.

We must bear in mind the relation of the parties. Formerly the husband had the legal right, to take possession of the personal estate of his wife, and appropriate it to his own use. There is no law to prevent his doing so now, with her consent, express or implied.

If this had been a contract, between the creditors of the husband and the defendant, for the property assigned, plaintiff would have succeeded upon the ground, that the defendant consented to the mode of doing business by the husband, in holding himself out as the principal, and procuring credit as such; but there is an inconsistency in securing a title to the property by a transfer from the husband, and then holding the wife liable, personally, for the debts as principal. I do not think the finding of the learned referee can be sustained, either as a finding of fact or conclusion of law.

A new trial may develop a different state of facts. The judgment must be reversed and a new trial ordered.

ALLEN, GROVER, and FOLGER, JJ., concur.

RAPALLO, J., dissents. Judgment reversed.

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FELIX J. DUFFY, Respondent, v. DENNIS J. O'DONOVAN et al., Appellants.

Plaintiff purchased certain real estate at an auction sale, paying ten per cent of the purchase-price. The usual memorandum of sale was signed by him and the auctioneer. At the place, and shortly before the hour agreed upon, for the payment of the balance of the purchase-money, he tendered vendor's agent a check for the amount, which the agent refused, unless certified, but permitted plaintiff to go for the certification, and with the impression that the certified check would be received at any time during the day. Plaintiff returned about two hours after the time fixed for performance, with the check duly certified, which he tendered, and demanded the deed. This was refused, upon the ground, that the time for performance had passed. The lands were the same day conveyed to a third person, who had full knowledge of all the facts. In an action for specific performance against the vendor and subsequent purchaser, the complaint in which set up a contract of sale, which was admitted by the answer, — *Held*,

1st. Defendants having admitted contract, and not having pleaded the statute of frauds, are deemed to have renounced the benefit of it.

2d. Performance at the precise time was waived, and vendor was estopped from claiming, that the right to perform was lost by lapse of time.

3d. The tender not having been refused because not in money, the right to demand money was waived.

4th. The subsequent purchaser took title subject to the equities of plaintiff, and was properly required to convey to him.

(Submitted June 21, 1871; decided September 2, 1871.)

APPEAL from judgment of the late General Term of the second judicial district, affirming judgment entered in Kings county upon decision of court in favor of plaintiff.

Action for specific performance of contract for the sale of lands in Brooklyn. The premises in question were owned by the defendant Dennis O'Donovan, and were sold to the plaintiff at public auction on the 11th of November, 1868. The usual memorandum of sale was signed by the auctioneer and the plaintiff, the latter paying ten per cent of the purchase-price, and agreeing to pay the balance on the first day of December, at twelve o'clock, at the office of T. F. O'Donovan,

202 Broadway, New York, when and where the deed was to be ready for delivery. Shortly before the hour named, the plaintiff was at the place named, and Mr. T. F. O'Donovan, the agent and attorney of the vendor, was there with the deed ready for delivery, and the amount to be paid was computed and ascertained. The plaintiff proposed to give his check for the amount, on one of the banks in the city of Brooklyn, which the agent declined receiving unless certified, and the plaintiff then left to get the check certified, the agent saying he should be in his office all the day.

The plaintiff returned before two o'clock with a certified check for the amount, and tendered the same, and demanded a delivery of the deed, which was refused, on the sole ground that the time was past, and the sale had been canceled. The same afternoon the agent and attorney of the vendor called upon his father, the other defendant and a relative of the vendor, and induced him to take a conveyance of the premises, at the price agreed to be paid by the plaintiff, he having full knowledge of all the facts.

The justice before whom the case was tried gave judgment for the plaintiff, which was affirmed by the General Term of the Supreme Court, sitting in the second district.

Jacob A. Gross, for appellant. That the court should reform the findings of fact, in accordance with the evidence. (*Draper* v. *Stonewell*, 38 N. Y., 219.) The contract was void within the statute of frauds. (*Fenly* v. *Stewart*, 5 Sandf., 109; *Champion* v. *Plummer*, 1 N. R., 252; *Wheeler* v. *Collier*, M. & M., 123; *Dobell* v. *Hutchinson*, 3 A. & E., 355; *Wright* v. *Weeks*, 25 N. Y., 158; *Young* v. *Drake*, 1 Seld., 463.) Appellants have a right to object here to the legal sufficiency of the complaint. (Code, § 148; *Cole* v. *Blunt*, 2 Bosw., 125.) The rescission of the contract was legal, respondent being in default. (*Friess* v. *Rider*, 24 N. Y., 367; *Benedict* v. *Lynch*, 1 Johns. Ch., 374; *Harrington* v. *Wheeler*, 4 Ves., 690; *Lloyd* v. *Collett*, 4 Brown Ch., 469; *Lamond et al.*, v. *Davall*, 7 Ad. & Ell., N. S., 1029.) The

agent was a special agent, and a departure from his instructions could not affect his principal. (*Easton* v. *Clark*, 35 N. Y., 225; *Hotsinger* v. *National Corn Ex. Bank*, 6 Abb., N. S., 295; *Hogg* v. *Smith*, 1 Taunt., 347; *Gardiner* v. *Baillie*, 6 Term., 591; *Hutchings* v. *Munger*, 41 N. Y., 155.) No valid tender was made. (*Fellows* v. *Northrup*, 39 N. Y., 117; *Matthews* v. *Hamilton*, 23 470; *Ward* v. *Evans*, Salk., 442; S. C., 2 Ld. Raymond, 930; *Nickson* v. *Brohan*, 10 Mod., 100; Pynnel's Case, 5 Rep., 117; *Smock* v. *Dade*, 4 Rand, 642; *Barker* v. *Greenwood*, 2 Young & Coll. Exch., 418; S. C., 6 Law. J. N. S. Ex. Eq., 54; *Bartlett* v. *Pentland*, 10 B. & C., 760; *Russell* v. *Bangley*, 4 B. & A., 395; *Thorold* v. *Smith*, 11 Mod., 72, 87; *Blow* v. *Russell*, 1 C. & P., 365; *Underwood* v. *Nichols*, 17 Com. B., 239; *Keller* v. *Scott*, 2 Smedes & M., 81; *Williams* v. *Evans*, 35 Law J. N. S. Q. B., 111; *McCulloch* v. *McKee*, 4 Harris, 2, 8, 9; *Lobdell* v. *Baker*, 42 Mass., 202; *Bridges* v. *Garrett*, 21 L. T. N. S., 141, C. P; Edwards on Bills, 57, 58.)

Crook, Bergen & Pratt, for respondents. That the tender was good. (2 Green on Ev., § 601.) No tender was necessary, it having been waived by defendants' refusal to perform. (15 Wend., 474; 8 Johns., 474; 7 Johns., 476; 2 Sand. Chy., 143; 20 Barb., 509; 1 E. D. Smith, 463; *Stone* v. *Sprague*, 20 Barb., 509.) Time is not the essence of the contract. (*Gale* v. *Archer*, 42 Barb. 3, 20; 2 Story Eq. J., 62; 96 § 771; 99 § 775, note 4; *Hepwell* v. *Knight*, 1 Young & Collyer, 415; *Lamond* v. *Davoll*, 9 Adolph & Ellis, N. S., 1030.) The sale was not rescinded. (2 Bouv. Law Dic., 468.) The subsequent purchaser is subject to the equities attaching to the vendee. (*Laverty* v. *Moore*, 33 N. Y. 658.)

ALLEN, J. The judge by whom the case was tried has, upon competent evidence, found every fact essential to sustain the action and the judgment given therein. Upon the only question of fact in respect to which there was any conflict of evidence, if it was within the province of this court to review

the findings of fact, when there was any evidence to sustain them, we should concur in opinion with the court below.

The balance of evidence was with the plaintiff as to the transactions of the first of December, and clearly showed an assent on the part of the agent of the vendor that the vendee might have the brief time, beyond the hour named for the performance of the contract, necessary to procure the certification of his check. Had it been intended, to hold the plaintiff to a performance at the very minute, the party should have given notice of such intention at the time when the vendee proposed to go for the certification and return to consummate the transaction at a later hour in the day; and no objection being then made, the vendor was estopped from claiming, upon the return of the vendee within a reasonable time, that the right to perform had been lost by lapse of time.

But the objections taken to the judgment, will be considered in the order in which they are made upon this appeal.

1. It is objected that no contract, valid by the statute of frauds, was proved upon the trial. There are several answers to this. 1. It was not taken or made at the trial. 2. A contract of sale was averred in the complaint, and admitted by the answer. If the defendants had intended to insist upon the statute of frauds, or the invalidity of the contract for any other reason, they should have denied the making of the same, and put the plaintiff to proof, or set up the special matter relied upon. Having admitted the contract, and not having pleaded the statute of frauds, or insisted upon it in their answer, the defendants are deemed to have renounced the benefit of it. (*Harris* v. *Knickerbacker*, 5 Wend., 638; *Cozine* v. *Graham*, 2 Paige, 177.) 2. It is claimed that the plaintiff was in default, in that he was not prepared to accept the deed of the premises, and pay the ninety per cent of the purchase money remaining unpaid, precisely at the hour named for the performance of the contract. He was at the place shortly before the time, prepared to complete the purchase, but was met with the objection, that his check was not certified, and

left, with the assent of the seller's agent, to procure the required certification.

Performance at the precise time was waived by the agent, and the vendor cannot claim that this was without authority. It was an act clearly within the scope of his authority, as indicated to the plaintiff, and no secret, undisclosed instructions of the principal to the agent, if any such had existed, restricting and limiting his apparent authority, could affect the rights of innocent third persons. But without this assent, the plaintiff's right in equity to a performance of the contract was perfect. In legal actions the rule is more stringent than in equity, and a party to a contract, asserting his right by an action at law, must bring himself strictly within the terms of the contract; but courts of equity will enforce contracts specifically, when no action for damages could be maintained. (*Friess* v. *Rider*, 24 N. Y., 367; *Lennon* v. *Napper*, 2 Sch. & Lef., 684.)

Time is not ordinarily regarded in equity as the essence of the contract, unless the parties have so treated it, or it necessarily follows from the nature and circumstances of the contract.

If the party seeking performance has acted with good faith and reasonable diligence, and there has been no change of circumstances affecting the equities of the parties, or the justice of the contract, and time has not been expressly, or by implication, made of the essence of the contract, a court of equity will decree a specific performance, although there has not been a literal performance as to time. (Story Eq. Jur., § 76, and cases cited in notes.) The plaintiff here was guilty of no laches, but was ready, desirous, and eager to perform his contract; and the delay of one hour and a half in the actual tender of the money, was excused by the acts of the vendor's agent, and there is nothing in the character of the property, or the nature of the transaction to indicate that time was intended to be essential. 3d. It is urged that the tender was insufficient, as it was not in money. But it was not refused for that reason. It was rejected because not made

in time, and not because the certified check was not money or legal tender. It cannot now be objected, that the party could not have been compelled to accept a certified check in lieu of money. He waived his right to demand the money by not asserting it at the proper time. (*Carman* v. *Pultz*, 21 N. Y., 547; *U. S. Bank of Georgia*, 10 Wheat., 333; *Snow* v. *Perry*, 9 Pick., 542.)

The objection to the tender could have been obviated, and, therefore, was waived, not having been taken. 4th. The objection that the defendant, Timothy O'Donovan, was a *bona fide* purchaser, and therefore, not affected by the equities of the plaintiff, is not sustained by the evidence. The conveyance to him was collusive and to avoid the plaintiff's claim, and was taken by the grantee with full notice and knowledge of all the circumstances. He took his title subject to the equities of the plaintiff, and was properly required to convey to the plaintiff. (*Laverty* v. *Moore*, 33 N. Y., 658.)

The judgment should be affirmed with costs.

All concur. Judgment affirmed.

DANIEL WARNER, Appellant, *v.* JAMES H. WARREN, Respondent.

Where a husband, with a fraudulent intent, obtained from his wife a power of attorney, authorizing him to do business in her name and as her agent, and after having by false and fraudulent statements established a fictitious credit, by means whereof he obtained, upon credit, large amounts of goods, a portion of which he sold in the original package at less than cost, and then induced his wife to make an assignment, the wife having no knowledge of the fraudulent intent.—*Held*, that the wife is chargeable with knowledge of the fraudulent scheme of her agent, the husband, and the assignment is void. (GROVER, J., FOLGER and RAPALLO, JJ., concurring.)

In an action brought by the assignee against a sheriff, who had taken the assigned property upon attachment against the wife.—*Held*, that the declarations of the husband, disconnected with any act of his, as agent, made in the absence of the wife, were not competent evidence.

(Argued September 8th, 1871; decided September 11th, 1871.)

Statement of case.

APPEAL from judgment of the late General Term of the seventh judicial district, affirming judgment entered in Monroe county upon report of a referee in favor of plaintiff.

This is an action of replevin, brought by plaintiff as assignee of Mary A. Gilman against the sheriff of Monroe county, who had taken the assigned property upon an attachment found against the assignor.

In 1860, Thomas C. Gilman, residing in Rochester, having been then recently discharged from his debts under the insolvent laws of this State, formed a plan to engage in the business of a boot and shoe dealer in said city in the name of his wife; and after establishing a credit in New York and Boston, and purchasing on the strength of it, to assign the property in his hands so as to defraud creditors.

Accordingly, he procured from his wife, Mary A. Gilman, a power of attorney, reciting that she was about to engage in said business, in Rochester, and constituting him her agent and attorney, with general power to conduct the business for her and in her name. Mrs. Gilman had no property or other means; and her husband, before making any purchase, borrowed $10,000 with her knowledge. At different times in 1861 and 1862, Gilman, by false representations as to the pecuniary circumstances of Mrs. Gilman, induced dealers in New York and Boston to sell her boots and shoes, to a large amount, on credit, so that in November, 1862, she owed on that account to the firm of Claflin, Mellin & Co., of New York, $6,278.55; and to H. L. Daggett & Co., of Boston, over $1,800. Some of the goods bought in November, 1862, Gilman sent to Elmira and Buffalo, in the original cases, and caused them to be disposed of there, for his benefit to over $800, cost prices, and he used the avails. Mrs. Gilman in no manner superintended or controlled the business, except by giving her husband the power of attorney; and in that act as in all others pertaining to the business, she was used by her husband to defraud said creditors. On the 25th November, 1862, Mrs. Gilman, at the instance of her husband, made an assignment to the plaintiff, in trust, to pay her creditors, containing preferen-

ces. The assignment was not, in any respect, directed or controlled by Mrs. Gilman, except that she expressed a wish that her mother should be preferred as a creditor, which was done. The referee found that Mrs. Gilman intended no wrong, but she was a passive instrument in the hands of her husband, whereby the creditors from whom said stock was purchased were defrauded.

The stock in trade included in the assignment was, on the 11th December, 1862, seized by the defendant as sheriff of the county of Monroe, by virtue of an attachment issued out of the Supreme Court, in an action brought by said Claflin, Mellen & Co. against Mrs. Gilman.

Upon the trial of the action, Lewis Selye, a witness for defendant, was asked to give conversation had with the husband, Thomas C. Gilman, in the spring of 1861, before the opening of the store and while it was being fitted up. This was objected to by plaintiff as incompetent and immaterial. Objection overruled and plaintiff excepted. The witness swore, in substance, that the husband stated, he did not expect to make money legitimately out of the business, but to establish a credit, and at the proper time to fail and divide the profits.

W. F. Cogswell, for appellant. The assignment not void as to creditors by reason of fraudulent intent of agent. (*Babcock* v. *Eckler*, 24 N. Y., 623, 631; *Wilson* v. *Forsyth*, 24 Barbour, 105, 120, 128; *Kavanaugh* v. *Beckwith*, 44 Barbour, 192, since affirmed in the Commission of Appeals.)

George F. Danforth, for respondent. The principal is liable for the fraud of her agent, although perpetrated without her knowledge or consent. (*Sandford* v. *Handy*, 23 Wend., 260; *Nelson* v. *Cowing*, 6 Hill, 336; *Bennett* v. *Judson*, 21 N. Y., 238; *Elwell* v. *Chamberlin*, 31 N. Y., 619; 1 Parsons on Contracts, vol. 1, p. 62, § 9; *Hern* v. *Nichols*, 1 Salk, 289; *Fitzsimmons* v. *Joslin*, 21 Verm., 129; *Jefferey* v. *Bigelow*, 13 Wend., 518; *Huguenin* v. *Baseley*, 14 Vesey, 289;

1 Sch. & Lef., 209–222.) The principal is chargeable with knowledge, and deemed to have assented to the fraud. (*Hough* v. *Richardson*, 3 Story Rep., 660; *Kennedy* v. *Greene*, 3 Mylne and Keene, 699, 10 vol., Eng. Ch. Reports, p. 370; *Patten* v. *Insurance Co.*, 40 N. H., 375; *Lewis* v. *Chapman*, 3 Beavan, 132; *Lewis* v. *Chapman*, Eng. Ch. Rep., vol. 43, pp. 132–134; *Williamson* v. *Brown*, 15 N. Y., 359.) The assignment was fraudulent and void. (Dunlop's Polegon Agency, 51, 62; *Durant* v. *Elliott*, 1 B. & P., 3; *Farm* v. *Russell*, 1 B. & P., 296; Burge Suretyship, 215, 229; *Robson* v. *Colse*, 1 Douglas, 277; *Graham* v. *Stark*, 3 Bankrupt Reg., 92.)

GROVER, J. The difference between the counsel, as to the validity of the assignment of Mrs. Gilman to the plaintiff, under which he claims title to the property in controversy, arises principally upon the different construction put upon the report of the learned referee. The counsel for the appellant construes it as finding, that the assignment was executed by Mrs. Gilman in good faith, without any intent to hinder, delay and defraud her creditors, with a further finding that her husband and agent, Thomas C. Gilman, had a fraudulent design to defraud her creditors, and that prompted by such a motive, he advised her to execute it; from which a legal conclusion was drawn by the referee, that although Mrs. Gilman's intentions were, fairly and honestly, to appropriate the property to the payment of her debts, yet the assignment is fraudulent and void, on account of the fraudulent designs of her husband. If this is the true construction of the report, the judgment cannot be sustained. The assignment is the act and deed of Mrs. Gilman, executed by her personally, and, so far as its validity depends upon the intention with which it was executed, it must be her intention, and not that of a person not a party thereto. The counsel for the respondent insists, that the fair construction of the report shows that the referee found that she executed the assignment, to enable her husband and agent, to consummate any object designed by him,

and with no other intent or purpose on her part, and that his design in causing her to execute it, appearing to have been to defraud her creditors, that such was the intent with which she executed, although ignorant of the design of her husband in requiring its execution by her. If this is the true construction, the legal conclusion, that it was fraudulent and void as to the creditors, was correct. If the construction is doubtful, that should be adopted, that will sustain, rather than one requiring a reversal of the judgment. The finding, in substance, is that in the latter part of 1860, or the forepart of 1861, Gilman formed a design to engage in the business of a boot and shoe dealer, at Rochester, not with a view of carrying on a legitimate business, but of establishing a fictitious credit, and purchasing, upon such credit, goods in New York and Boston, and then make an assignment to defraud the creditors; that he finally concluded to carry on the business in the name of his wife; that to enable him so to do, he procured from his wife a power of attorney, authorizing him to use her name and act as her agent, in carrying on the business of a boot and shoe dealer, both in making purchases and sales, and in all respects to manage and conduct the business; that neither Gilman nor his wife had any property whatever; that to enable him to establish a credit, $10,000 was borrowed of one Baker, for which no security whatever was given, except Mrs. Gilman, shortly thereafter, executed to the lender, papers authorizing the entry of a judgment against her for the amount, but upon which no judgment was ever entered; that after obtaining this money, Gilman proceeded to New York and Boston, and by false and fraudulent representations, succeeded in purchasing goods, partly for cash and partly for credit, from time to time increasing his indebtedness in New York and Boston generally, until October and November, 1862, when, by continuing his false and fraudulent statements, he made still larger purchases upon credit in New York and Boston, and having succeeded in effecting such purchases, proceeded to dispose of a portion of the goods so purchased, in the original packages, at Elmira and Buffalo, at less than

cost, and after effecting such sales, induced his wife, Mrs. Gilman, to execute an assignment to the plaintiff, embracing the property in question, with what debts might be due to her, to the plaintiff, in trust for the payment of her debts, giving a preference first to her mother as indorser of notes for her, and after such notes were paid, a preference to Baker, intended to secure the payment of the loan with which Gilman was enabled to start upon this career. The referee has not found, that Baker made the loan with intent to enable Gilman to create a fictitious credit, and thus be able to procure the goods which were afterward assigned to secure him, or that he was to participate in the fruit of the fraud, and, therefore, we cannot assume that the assignment was found fraudulent upon this ground. The referee has found that, in all this business, Mrs. Gilman was a guiltless, artless woman, who did not, in any manner, take charge of, or in any way, superintend or control, said business, and did not, in fact, intend to commit any wrong, but was a passive instrument in the hands of her husband, by whom the frauds were perpetrated, and who designed, by the assignment, to consummate the same. Mrs. Gilman may have been, and from the finding, it must be assumed that she was, guiltless, in a moral sense, from having acted under the marital control of her husband, ignorantly and without inquiry having executed any paper, or done any other act connected with the business, with no motive or intention, except to enable him to accomplish whatever purpose he chose, as her agent; but in a legal sense, for civil purposes, it is quite different. His objects became hers; his frauds were her frauds; and she is responsible therefor, however destitute of any knowledge thereof. While recent legislation has placed married women, for business purposes, in the same position as if sole, it has, in this respect, given them no additional advantages. While they may carry on business on their separate account, and employ their husbands as agents therein, if they do, they become legally liable for the acts of such agents, the same as though the marital relation did not exist. If they execute papers for

the mere purpose of enabling the husband to accomplish some purpose of his own, that purpose becomes the intention of the paper, although no inquiry is made or knowledge obtained as to such design. That would be so as to any principal, who was a mere passive instrument in the hands of an agent, having no motive or intention of his own in doing the act. Indeed, in such cases, it would seem that the act, in most cases, would be the act of the agent, and that he would be liable therefor as principal, as Gilman undoubtedly would have been, in the present case, had the vendors sought to charge him as such; but when, as in the present case, Mrs. Gilman is charged as principal, her assignment, made to defraud her creditors, cannot be upheld, because she did not know of its purpose and the use to be made of it, while executing it as the passive instrument of her husband, without any intention on her part, except to enable him to effect his own purposes, which were to defraud the creditors. The findings of the referee are sustained by the proof of the acts of Gilman, and his declarations accompanying the same. The fact that neither had any property whatever. The loan procured from Baker without any security, and the use made of the money in establishing a fictitious credit. The preference given to him by the assignment, which was an uncontroverted fact. It is only by the assumption, that Mrs. Gilman was a mere automaton in respect to the entire business that she can be excused, in a moral view, from the guilt of participating in the entire fraudulent scheme. She cannot be so excused in a legal view. The judgment must be affirmed, unless some of the exceptions taken to the rulings of the referee by the appellant were well taken. The defendant introduced Lewis Selye, who testified that he had two conversations with Gilman in the spring of 1861; one before the store was opened and one while the store was fitting up; and the defendant's counsel asked what he said. The plaintiff's counsel objected to the testimony as incompetent and immaterial. The referee overruled the objection, to which the plaintiff's counsel excepted. In considering this exception it must be borne in

mind, that the defendant was justifying the taking of the property, upon process against Mrs. Gilman sued out to collect her debt, under whom the plaintiff made title by her assignment to him, in trust, for her creditors. Thus it was assumed by both parties that Mrs. Gilman had had title to the property. The evidence showed, that she acquired title by purchase made by her husband as her agent for her, while solely conducting the business as such agent. The objection overruled, was to proof of what was said in the conversations including both. If therefore, what was said in either was competent, the objection was too general, and the exception to the ruling thereon cannot be sustained. The first conversation was before anything had been done in the business, and clearly inadmissible against the plaintiff, to defeat his title acquired from Mrs. Gilman. The second was while the store was fitting up for the business, but had no connection with any act done in relation to the business or any other act. It was the mere declaration of Gilman, disconnected with any act; and as such, not admissible against his wife or one claiming title by assignment from her. The rule that the declarations of an agent, made while doing no act for his principal, are not competent evidence against the principal, is elementary, and needs only to be stated. It is equally clear that the declarations of a husband in the absence of the wife, are not competent evidence against the wife, or one claiming title under her. Selye, under the ruling, gave material evidence, if the declarations were competent, in favor of the defendant. The referee held the testimony competent, and it must, therefore, be presumed that he considered it in determining the case. The ground of the objection was sufficient to raise the question as to the competency of the evidence. We cannot say that the other testimony, so conclusively established the facts found by the referee, that it would have been a legal error to have found the other way. To do this, the evidence must be, so conclusive, that if the cause had been tried by jury, it would have been the duty of the judge to direct a verdict, and error to submit the question to the jury. The plaintiff

may have been prejudiced by the testimony; and as it was not competent, the judgment must be reversed and a new trial ordered. Costs to abide event.

FOLGER and RAPALLO, JJ., concur.

C. J. ALLEN and PECKHAM, JJ., concur in result for error in the admission of evidence, expressing no opinion on other questions.

Judgment reversed.

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WILLIAM BULLYMORE, Respondent, *v.* WILLIAM COOPER, JR., Appellant.

An order of discharge, issued under the act providing for the discharge of a debtor imprisoned on execution (art. 6, title 1, chap. 5, part 2, Revised Statutes), will not *per se* protect a sheriff acting under it, unless it contain recitals of all the facts necessary to give jurisdiction to the court granting it. It is not sufficient that it shows general jurisdiction of the subject-matter; but that jurisdiction of the person and of the especial case, was acquired by the taking of the necessary steps prescribed by the statute to that end.

If the order fails in any of these particulars, the facts needful to give jurisdiction must be established by proof *aliunde*.

The court does not acquire jurisdiction to issue the order, unless at the time of the presentation of the petition, there is indorsed thereon an affidavit in the form prescribed by section 5, sworn to by the applicant.

The omission of an account of real and personal estate, as it existed at the time of the debtor's arrest, as required by section 4, is not supplied by allegations in the petition, that prior to the rendition of the judgment, in execution of which the debtor was arrested, he filed his petition in bankruptcy, was adjudged a bankrupt, and an assignee of all his property was appointed.

(Submitted September 6th, 1871; decided September 11th, 1871.)

APPEAL from order of the late General Term of the eighth judicial district, reversing judgment entered in Cattaraugus county upon decision of the court and awarding a new trial. (Reported below in 2 Lansing, 71.)

Statement of case.

This is an action brought against defendant as sheriff of Cattaraugus county for an escape.

On the 11th November, 1868, plaintiff perfected judgment in the Supreme Court against Abner N. Flint and Norman Bullock. On the 30th December, 1868, an execution against the persons was issued upon said judgment to the defendant, as sheriff, who arrested said Flint and Bullock and committed them to jail. Applications were made to the county court of Cattaraugus county for their discharge. The following is a copy of the petition presented upon the application of Flint:

"IN THE MATTER OF THE PETITION OF ABNER N. FLINT TO BE DISCHARGED FROM IMPRISONMENT.

"*To the County Court of Cattaraugus county:*

"The petition of Abner N. Flint respectfully shows to this court, that he has been and still is imprisoned by the sheriff of Cattaraugus county, within the jail limits of said county, by virtue of an execution issued out of the Supreme Court of the State of New York, upon a judgment rendered therein in favor of Richard Bullymore. That he has been so imprisoned for more than sixty days, and that the amount of said execution is less than $200; that the cause of such imprisonment is an alleged fraud in procuring the property upon or for which the said judgment was rendered. And your petitioner further shows, that, prior to the rendition of said judgment, he filed his petition in bankruptcy in the office of the clerk of the District Court of the United States for the northern district of New York, and on the 24th day of June, 1868, was duly declared and adjudged a bankrupt, under the provisions of the bankrupt law of the United States, passed March 2, 1867, entitled, 'An act to establish a uniform system of bankruptcy throughout the United States;' that, on the 10th day of August, 1868, George L. Winters, of Ellicottville, was duly appointed as assignee of all his property for the benefit of creditors, and that your petitioner has no property whatever, either real or personal, either in law or equity,

wherewith to make an account under the provisions of article 6, chapter 5, part 2, title 1, of the Revised Statutes, and that said proceedings in bankruptcy are still pending, and that your petitioner has a family who need his services for their support; wherefore, your petitioner prays that he may be discharged from his said imprisonment.

"A. N. FLINT.

"Sworn before me, this 13th day of March, 1869.

"F. BUCKLIN, *Justice of the Peace.*"

The following affidavit was indorsed upon the petition:

"STATE OF NEW YORK, CATTARAUGUS COUNTY, } *ss.:*

"I, Abner N. Flint, the within named petitioner, do swear that the petition and account of my estate, and of the charges therein, hereto annexed, are, in all respects, just and true, and that I have not, at any time, or in any manner, disposed of, or made over, any part of my property, with a view to the future benefit of myself or my family, or with an intent to injure or defraud any of my creditors.

"A. N. FLINT.

"Sworn before me, this 13th day of March, 1869.

"F. BUCKLIN, *Justice of the Peace.*"

Upon said petition the following order was issued:

"At an adjourned term of the County Court, held in and for the county of Cattaraugus, on the 30th day of March, 1869, at the court-house in Little Valley: Present—Hon. R. LAMB, county judge.

"March 30, 1869. In the matter of Abner N. Flint, an imprisoned debtor.

"On reading and filing the petition of the above named Abner N. Flint, praying for an order that the said Abner N. Flint be discharged from imprisonment upon two executions issued out of the Supreme Court in actions wherein Richard

Statement of case.

Bullymore and Cyrus B. Salisbury were respectively plaintiffs, and Abner N. Flint and Norman Bullock were defendants, which judgments were entered as follows, in the clerk's office of Cattaraugus county, the one in favor of Richard Bullymore on the 18th day of November, 1868, and the one in favor of Cyrus B. Salisbury on the 23d day of October, 1868, and on reading and filing the inventory or schedule annexed to said petitions, and the affidavits of the said Abner N. Flint thereto annexed, that the said inventory contained a just and true schedule of all the said Flint's property, either in law or equity, and all securities, choses in action, or property of whatever name or nature, and that the said Flint has not disposed of any of his property, at any time, with a view to hinder, cheat, or delay or defraud his creditors, and on filing due proof of personal service of a copy of the petitions, affidavits, inventory and notice of motions upon the respective attorneys of the said plaintiff for the plaintiffs in the said judgments and executions, fourteen days previous to the hearing thereof, and the said Abner N. Flint being brought before the court personally, on motion of William Manly, of counsel for the petitioner, it is ordered that the said petitioner, Abner N. Flint, be and he hereby is discharged from his imprisonment under and in pursuance of the executions aforesaid.

"A. H. HOWE, *Dep. Clerk.*"

The order for the discharge of Bullock is similar.

These orders were served upon defendant, who thereupon discharged the prisoners.

D. H. Bolles, for appellant. If the county court acquired preliminary jurisdiction, it is sufficient even if orders failed to show it. (*Horton* v. *Audinwood*, 7 Wend., 200; *Stanton* v. *Shell*, 3 Sand., 323.) The petition of Flint states he has no property. Even if false, it was conclusive upon question of jurisdiction. (*Porter* v. *Purdy*, 29 N. Y., 106, and cases cited; *Betts* v. *Bagley*, 12 Pick, 572.) The action of the court was judicial and cannot be reviewed in this action. (*Skinmont*

v. *Kelley*, 18 N. Y., 355; *Rusher* v. *Sherman*, 28 Barb., 416; *Van Alstyne* v. *Erwine*, 11 N. Y., 331; *Sandt* v. *Hilts*, 19 Barb., 283.) A liberal rule of construction should prevail upon question of jurisdiction. (*Rusher* v. *Sherman*, 28 Barb., 416; *Van Alstyne* v. *Sherwin*, 11 N. Y., 331.) The court had the right to act upon presumption, that the condition before arrest existed at the time of arrest. (*Barnes* v. *Harris*, 4 N. Y., 374; *Reno* v. *Pindar*, 20 id., 298; *Hoose* v. *Sherrill*, 16 Wend., 34; *Bromley* v. *Smith*, 2 Hill, 517.) Every reasonable presumption is in favor of the existence of a jurisdictional fact. (*Barnes* v. *Harris*, *supra*; *Reno* v. *Pindar*, *supra*; *Hoose* v. *Sherrill*, *supra*; *Bromley* v. *Smith*, *supra*; *Schermerhorn* v. *Talman*, 14 N. Y., 93; *Salters* v. *Thomas*, 3 Pai., 338, 346; *Roosevelt* v. *Kellogg*, 20 Johns., 208; *Hart* v. *Dubois*, 20 Wend., 233.) The order was a perfect justification, although county court had no jurisdiction. (*Cantillon* v. *Graves*, 8 Johns., 472; *Yates* v. *People*, 6 id., 335; *Cable* v. *Cooper*, Spencer's opinion, 15 id., 157; *Sabacool* v. *Boughton*, 5 Wend., 170; *McGuinty* v. *Herrick*, id., 241; *Horton* v. *Hendershot*, 1 Hill, 118; *Wiles* v. *Brown*, 3 Barb., 37; *Shaw* v. *Davis*, 55 id., 389; *Chegary* v. *Jenkins*, 5 N. Y., 376; *Hutchinson* v. *Brand*, 9 N. Y., 208; *Porter* v. *Purdy*, 29 id., 106; *Webber* v. *Gay*, 24 Wend., 485; *People* v. *Warren*, 5 Hill, 440.) The order need only state, in general terms, the steps necessary to give preliminary jurisdiction. (*Salter* v. *Tobias*, 3 Paige, 338; *Frary* v. *Dakin*, 7 John., 75; *Service* v. *Hermance*, 1 id., 91; *Roosevelt* v. *Kellogg*, 20 id., 207.)

B. H. Austin, Jr., for respondent. The orders discharging Flint and Bullock were void. (*Browne* v. *Bradley*, 5 Abb., 141–144; *People* v. *Brandon*, 1 Seld., 106, 124; *Stanton* v. *Ellis*, 2 Ker., 575; *Hale* v. *Sweet*, 40 N. Y., 97; 2 Story, Circuit Court R., pp., 360, 362; *Fisher et al.* v. *Currier*, 7 Metcalf, 424, 427; In the matter of Grant, 2 Story, 312, 310; Hilliard on Bankruptcy, p. 169.) The orders are fatally defective, and do not protect defendant. (*Frees* v.

Ford, 2 Seld., 176–178; Cow. & Hill's notes, pp. 946, 1013, in the matter of Mount Morris Square, 2 Hill, 14, 19; *Embury* v. *Connor*, 3 Com., 511, 523; *Denning* v. *Corwin*, 11 Wend., 647–653; *Chegary* v. *Jenkins*, 1 Selden, 377–381; *Bush* v. *Pettibone*, 5 Barb., 273–276, 277; same case, 4 Com. p. 300; *Bloom* v. *Burdick*, 1 Hill, pp. 130–139–141; *Bennett* v. *Burch*, 1 Denio, 141–145–146; *Castellano* v. *Jones*, 1 Seld., 164–171; 12 Mass., 319; *Wise* v. *Withers*, 3 Cranch, 331; *Suydam and Wyckoff* v. *Keyes*, 13 John. R., pp. 443–446; *Brown* v. *Compton*, 8 Term R., p. 425; *Cable* v. *Cooper*, 15 John. R., pp. 152–154–155; *Van Slyck* v. *Taylor*, 9 John. R., p. 146; *Jackson* v. *Smith*, Sh'ff., 5 John. R., p. 115; *Crepp* v. *Durden et al.*, Cowp. R., p. 640; *Smith* v. *Shaw*, 12 John. R., pp. 257, 265; See also Crocker on Sh'ffs, p. 249, § 587.)

FOLGER, J. The County Court had jurisdiction of the general subject-matter, in which these orders of discharge were issued, and they were in substance and effect such as it was authorized to make. (*Hart* v. *Dubois*, 20 Wend., 236; 2 R. S., 31, § 1, *et seq.*; Laws of 1847, chap. 280, p. 369, § 29, judiciary act.)

The sheriff, the defendant in this case, could defend himself by virtue of these orders, if he could show further, that the County Court had jurisdiction of the parties to the controversy, upon whom the orders were to operate; or if the orders on their face, are such as the court could make for his guidance and control, he could justify under them alone, without showing that, in fact, jurisdiction had been acquired by the court in the particular cases. (*Bennett* v. *Burch*, 1 Denio, 141.)

We do not yield to the proposition of the appellant, that the orders are sufficient, if they contain simply the direction of the court in writing, awarding the debtor's discharge from imprisonment, in addition to a designation of the person and of the subject-matter to which they relate. A designation of the subject-matter, is necessary to show that it is within the

general jurisdiction of the court. But as the court has not the particular jurisdiction of the person and the especial case, until certain steps are taken to that end, just as necessary is it that those steps be designated, to show that the person and the case has come under the particular jurisdiction of the court. And so we read *Bennett* v. *Burch* (*supra*), that not only must the order show, that it is in a matter over which the court or officer has general jurisdiction, but this being shown, other facts must be alleged, showing that the particular persons and case involved in that matter have, by certain proceedings, become subject to the jurisdiction of the court or officer in that instance. There must concur to make the order valid in fact, both the jurisdiction generally of the subject-matter and the jurisdiction of the person and the individual case, acquired by especial proceedings to that end. Both must be shown to establish jurisdiction. And if, without showing upon the trial facts to establish jurisdiction, the order alone is relied upon for a defence or justification, then the order must contain allegations of such facts. The sheriff would not have been justified, in releasing the judgment debtors upon an order of discharge made by a surrogate or a coroner, because he was bound to know that the law gave no jurisdiction of such a matter to either of those officers. He was equally bound to know that the law gave no jurisdiction to a County Court, to discharge a debtor held in execution, until certain prerequisites had been observed in that particular case, on the part of each particular debtor, in the matter of his discharge from imprisonment. If he chose to rely upon his ability to show before a tribunal, that such prerequisites had been fully complied with, perhaps he might comply with an order of discharge, which was the simple direction of the court in writing awarding the debtor's discharge. But if he wishes to avail himself of the protection of the order alone, he must see to it, that it contained sufficient allegations of all the facts which must exist, to confer general and special jurisdiction. The recitals are not necessary to the validity of the order. That is valid if the facts exist which make it so, not

withstanding they are not recited in it. But if the order is relied upon, without proof *aliunde* of the facts needful to jurisdiction, there must be in it ample allegations thereof. *Hart* v. *Dubois* (20 Wend., 236), cited by the appellant, does not seem to be adverse to these views. In that case the court claims the order to be regular on its face, and asserts, that the court did not lack jurisdiction for the reason, that the provision of the statute as to length of notice which was not observed, being for the benefit of the creditor, might have been waived by him, and it would be intended that he did waive it. The court also says, which is very significant, "of itself (*i. e.*, the order) it is not denied to have been a complete protection." And the statement of the case, shows that the order was made, "upon his petition and compliance with the requirements of the statute." The question in that case seems to have been, whether knowledge acquired by the sheriff, apart from the papers on which he justified, would render him liable. It is held that it will not, in that case, and in *The People* v. *Warren* (5 Hill, 440).

If the orders in this case do not state facts, which if existing, gave general and special jurisdiction, then they did not *per se* protect the sheriff.

The statute (2 R. S., p. 32, §§ 1, 3, 4, 5, 6), shows, that the court does not obtain jurisdiction of the parties to the controversy, upon whom the orders are to operate, until the presentation to it of a petition for discharge from imprisonment, which must set forth the cause of the imprisonment, and of a just and true account of all the petitioner's estate, real and personal, in law and equity, and of all charges affecting the same, both as such estate and charges existed at the time of the imprisonment; and as they exist at the time of preparing the petition, together with a full and true account of all deeds, securities, books, and writings whatever, relating to the said estate, and the charges thereon, with the names and places of abode of the witnesses to such deeds, securities, and writings, and due proof of the service of the same upon the creditors, at whose suit the petitioner is imprisoned, their

personal representatives or their attorney. The statute also requires, that at the time of presenting such petition, an affidavit, in a prescribed form, should be indorsed upon the petition and should be sworn to by the applicant. (Id., p. 32, § 5.)

The appellant insists, that this affidavit need not be presented to the court, at the time of presenting the petition and account, as one of the prerequisites to jurisdiction of the case. The force of his argument, if admitted, would compel to the conclusion, that though no affidavit be ever indorsed upon the petition, the omission would not debar of jurisdiction. We cannot assent to this. The fifth section of the statute is imperative, that the affidavit shall be indorsed on the petition at the time of the presentation of it. The sixth section, upon the presentation of the petition and account, authorizes the court to take action. But the command of the fifth section, that the affidavit shall be indorsed at that time, is laid as much upon the court as upon the petitioner; and the court gets no authority to initiate action with a disobedience of that command. The two sections go together, and require that not only shall the petition and account be presented, but that they shall be verified; and a petition and account not verified is, for the purpose of the statute, no petition and account. An object of the statute is, to search the conscience of the petitioner at the outset of the proceedings. And hence, it has, with minuteness, specified the statement he shall make in his account, and has prescribed not only the substance of the matter to which he shall make affidavit, but the very form of words in which it shall be framed. This cannot be dispensed with or postponed, and the court have power to proceed. At no time after the presentation of the petition can the affidavit be indorsed and sworn to, and the demand of the statute be answered. Unless then it is admitted, that the court can acquire the power of proceeding upon an unverified petition and account, it fails to acquire jurisdiction, without the affidavit accompanies the petition at the time of presentation. And when section six, on the presentation of

such petition confers jurisdiction, the force of the particle, "such," is not confined, as is claimed by the appellant, to the petition, as it is mentioned in sections one and two; and though the words "such petition" occur in successive sections, in each section they mean that petition which, to be complete, must concord with the requirements of all the sections. Hence, "such petitions" is a petition containing all that is required by sections one and two in the case, there provided for, and by section four, and having the affidavit indorsed upon it and sworn to, which is required by section five.

There is a difference in phraseology, as noticed by the appellant, in the different articles of this title of the Revised Statutes. In some of them the sections which speak of the papers to be presented to the court or officer, do name the affidavit, and in some (as in this article) they do not. We do not reason from this difference (as does the appellant), that in some cases the affidavit is a needful paper to confer jurisdiction, and in some it is not. We find throughout the title, in all its articles, the requirement of an affidavit verifying the contents of the petition. There is no permission, that such verification may come after the presentation of the papers to the tribunal. On the contrary, it is plain that it must precede or accompany it, and that the petition, without which the court or officer cannot act, must be a petition sanctioned by the oath of the applicant. We can but think that not only a petition, but a verified petition, is necessary to give the tribunal jurisdiction.

Upon reading the orders of discharge, it is seen that they recite the reading and filing of the petition (and that is a presentation of it), praying a discharge from imprisonment; that the petition sets forth the cause of imprisonment, the presentation of an inventory or schedule annexed to the petition, and an affidavit of the petitioner thereto annexed, that the inventory contains a just and true schedule of all the petitioner's property either in law or equity, and that the petitioner has not disposed of any of his property at any time, with a view to hinder, cheat, delay or defraud his creditors,

and that due proof was made of due service of copy, petition, inventory, affidavit, and notice.

The orders do not show the presentation of such an account as is demanded by the statute. It requires an account of real and personal estate, as it existed at the time of the arrest, as well as at the time of preparing the petition. The order does not allege such an account. And that it should show this, is a requisite of jurisdiction. (*The People ex rel.* v. *Bancker*, 5 N. Y., 106.) We consider the statute imperative, that the papers presented to the court shall conform with exactness to its provisions. It is matter necessary to the jurisdiction of the court, not only that a petition and account should be presented to it, but that they shall be the very petition and account specified. And if it is jurisdictional that such an account be presented, it is an omission from the orders of an allegation of a fact, necessary to show jurisdiction, when the order states the presentation of an account which does not comprehend that.

Again, the statement in the order, of the affidavit of the petitioner, does not show it to be such as the statute requires. It omits to state that the petitioner made affidavit, that he has not disposed of or made over any of his property for the benefit of himself or his family.

It follows, that the orders alone were not a protection to the defendant.

Did the defendant show upon the trial, that the papers presented to the court met the requirements of the statute, and gave to it jurisdiction?

The petition of Bullock does, in its contents, conform to the statute. It sets forth the cause of imprisonment. It describes the account annexed to it in the very language of the statute. The account annexed purports and seems to be all that the statute requires. The affidavit, in its form and contents, conforms with exactness to the requirements of section 5 above quoted.

The affidavit to the petition was sworn to before its presentation to the County Court. It was sworn to on the 17th

February, 1869. It was not presented until the 5th March, 1869. It is objected to its sufficiency, that it should have been sworn to on the day and at the time of its presentation. As there are other questions as to the proceeding in these cases, which are decisive of this appeal, it is not necessary that we pass upon that question.

The petition of Flint does not, in its contents, so far as they relate to an account of his estate, conform to the statute. It does not have annexed to it any account. Therefore, the allegations of the petition are meant to take the place of an account; and it is claimed that they are sufficient for that purpose. Those allegations are the general one, that the petitioner has (that is, at the time of preparing his petition, has) no property whatever, real or personal, either in law or equity, wherewith to make an account. This would probably suffice for that requirement of the statute, that he shall annex to his petition a just and true account of all his estate, etc., as the same exists at the time of preparing the petition. But it does not meet the requirement of the statute for an account thereof, as they existed at the time of his imprisonment. This is a requirement, the observance of which is necessary to confer jurisdiction. (*People ex rel.* v. *Bancker*, *supra.*) The appellant questions the pertinency in this case of the authority last cited. His criticism is, that it was a case on certiorari, in which the validity of the discharge was directly in question, and not where it is collaterally attacked, as in the case at bar. But the inquiry was there, as here, did the tribunal fail to obtain jurisdiction, by reason of the want of an account, which met the requirement of the statute, of the estate of the petitioner at the time of arrest? It was the same question, though arising in a different form. It was there held that the presentation of such an account was a jurisdictional necessity. And that ruling is an authority in this case. But it is claimed by the appellant, that there is other matter in the petition, which supplies any defect in the allegation above noticed. The petition alleges, that prior to the rendition of the judgment, in execution of which he was

arrested, he filed his petition in bankruptcy, and on the 24th June, 1868, was declared and adjudged a bankrupt, and on the 10th August, 1868, an assignee of all his property for the benefit of his creditors was appointed. It does not allege any subsequent proceedings, but states that proceedings are still pending. It is argued that the assignee in bankruptcy, by virtue of the bankrupt act, became vested with the title to all the estate and property of the bankrupt (U. S. Stat. at Large, vol. 14, p. 522, § 14; Laws of U. S., 1867, chap. 176); and that therefore, the allegation of his appointment, is equivalent to an allegation, that Flint had no estate at the time of his arrest of which to make an account. But there are difficulties with this position. 1st. The assignee did not, in any event, become vested with the title to *all* the bankrupt's property, for the act exempted furniture and other necessary articles and such as the assignee should set apart, not to exceed $500, the wearing apparel of the bankrupt, his wife and children, his uniform, arms and equipment, if then or before a soldier in the militia, and all property exempt from execution by the laws of the State. 2d. The assignee did not become vested with title, until an assignment had been executed to him, the language of the act being, "the judge or * * * register shall, by instrument under his hand, assign and convey to the assignee all the estate * * * of the bankrupt * * * thereupon, by operation of law, the title to all such property * * * shall vest in said assignee;" and there is no allegation in the petition of the making of such assignment. 3d. The petitioner, even if an assignment had been made, still had a contingent interest in the property assigned, and had the right to reclaim from the assignee any surplus remaining after the payment of debts and expenses. For, though there is no express provision to that effect in the bankrupt act, yet by the force of general principles, the assignee would hold any remaining surplus as a trustee for the bankrupt, and be compelled to account. So that the mere statement of the proceedings in bankruptcy, as contained in the petition of Flint, was not a compliance with the requirement

of the statute, that the papers should contain a just and true account of his estate, as it existed at the time of his imprisonment.

The affidavit to the petition of Flint was sworn to, also, on a day (13th March, 1869) prior to the day (30th March, 1869), of its presentation to the county court.

But as by the other defects in the papers presented to the County Court on behalf of Flint, that court failed to obtain jurisdiction of the proceedings for his discharge, and as the sheriff, the defendant, is liable to the plaintiff as for an escape, for his act in releasing Flint from imprisonment on the void order of discharge made in his case, and as that is sufficient to enable the plaintiff to maintain his action against the defendant, it is not necessary that we inquire whether the fifth section of the statute requires, that the affidavit shall be sworn to at the time of presenting the papers to the court, and not before. So that, without deciding whether the court failed to acquire jurisdiction in the case of Bullock, having come to the conclusion that it did so fail in the case of Flint, they being defendants in the same judgment and execution of the plaintiff, we for that reason affirm the order of the court below, and give judgment absolute for respondent, with costs to the respondent.

All concur save ANDREWS, J., absent.

Judgment affirmed.

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PHILIP F. PISTOR, Survivor, etc., Appellant, *v.* AMOS F. HATFIELD et al., Respondents.

Plaintiff demurred to two counts of defendants' answer. The demurrer was sustained; and from the order sustaining demurrer, defendants appealed, but without giving security or obtaining a stay. Plaintiff thereupon noticed the cause, took an inquest at the circuit, and perfected judgment. This judgment was, upon defendants' motion, set aside. From the order setting it aside plaintiff appealed, defendants moved at a General Term, one of the members of which, was the justice who

Statement of case.

granted the order, to dismiss the appeal upon the grounds, that the order was not an appealable one; also, that plaintiff had waived his appeal by appearing, and without objection, arguing the appeal from the order sustaining the demurrer. The appeal was dismissed. From the order of dismissal an appeal was brought to this court.—*Held*,

1st. That as under section eight of article six of the State Constitution, the General Term, as constituted, had no power to review the order or to entertain the question, whether it was an appealable one, it must be assumed that only the question of waiver was entertained and passed upon.

2d. That plaintiff's appearance and argument of the appeal from the order sustaining demurrer, was no waiver of appeal from the order setting aside inquest and judgment.

3d. That this court will not examine into the merits of the Special Term order appealed from, as it has not been reviewed upon its merits by the General Term.

(Decided September 11th, 1871.)

APPEAL from order of the late General Term of the first judicial district, dismissing plaintiff's appeal from an order of Special Term, setting aside an inquest and judgment entered thereon.

This action was brought, to recover back money paid under a judgment which had been reversed. Defendant set up three defences; first. That the court had no jurisdiction to reverse the judgment; second. That one of the defendants had appealed; and third. A denial of payment.

Plaintiff demurred to the first two counts of defendants' answer. The demurrer was sustained. From the order defendant appealed, but gave no undertaking and procured no stay. Plaintiff took an inquest at the circuit and entered judgment. These upon defendants' motion, the Special Term (INGRAHAM, J.,) set aside; afterward the appeal from the order sustaining demurrer was brought on for argument and order affirmed.

Defendants thereupon, moved to dismiss the appeal from the order setting aside inquest and judgment, upon the grounds, that plaintiff had waived his appeal by appearing and arguing, without objection, the appeal from the order sustaining demurrer; and, also, that the order was not an appealable

one. INGRAHAM, J., was a member of the General Term before which the motion was made. The motion was granted and appeal dismissed.

W. Watson, for appellant, arguing defendants' appeal from the decision of demurrer, was no waiver of appeal from order of INGRAHAM, J., vacating the judgment. (*Dey* v. *Walton*, 2 Hill, 406, in Ct. Errors.)

A. R. Dyett, for respondents. That appellant waived his appeal, having recognized and acted under order of INGRAHAM, J. (4 Abb. Pr. R., 468; 15 id., 140, *n*; 1 Robertson, 639; 4 E. D. Smith, 139; 16 Howard Pr. R., 483; 1 N. Y. Rep., 126; 7 Paige, 206; 18 N. Y. Rep., 481; 3 Abb. Pr. R., 142.) The attorneys for defendant, H. B. Brundret, were entitled to notice of appeal. (Code, § 327; *Coates* v. *Cottrell*, 28 Howard P. R., 436; 17 Abb. Pr. R., 86; 26 Howard P. R., 247.) The inquest and judgment were irregular. (*Merrill* v. *Grinnell*, 10 How., 31; Code, § 251; *Palmer* v. *Smedley*, 13 Abb., 185; Code, § 256; *Culver* v. *Felt*, 4 Robt., 681; 30 How., 442; *Farley* v. *Hebber*, 3 Dow. Pr. Cases, 538.)

GROVER, J. Section 8 of the Constitution provides, that no judge shall sit at General Term in review of his own decision. The case showed that Justice INGRAHAM, who made the order appealed from at Special Term, was a member of the General Term, by which the order dismissing the appeal was made. He was incompetent to sit upon a review of the order upon its merits, or to take part in determining, whether the order was appealable to the General Term, as the latter inquiry, involves an examination of the order equally with a determination of the appeal upon the merits. Hence, the General Term, as constituted, could not entertain the question, whether the order of the Special Term was not made upon the merits, instead of being based upon the alleged irregularity of the plaintiff's practice. The order of the General Term cannot, therefore, be sustained by this court

upon any such ground. The only question presented to the General Term, that Justice INGRAHAM could participate in determining was, whether the appellant had waived his appeal, by appearing at the General Term, upon the hearing of the appeal, taken by the respondent from the decision of the Special Term, sustaining the demurrer of the appellant to one of the defences interposed by the answer of the respondent. Such appearance was not a waiver of the appeal from the order made by Justice INGRAHAM. An appeal from a judgment or order, or the right to appeal therefrom, is waived by the party seeking to prosecute the appeal, having availed himself of a benefit given to him by the judgment or order, or proceeding in the cause, upon the assumption of the validity thereof. The appellant, in the present case, has done neither. The benefit secured to him by the order was a new trial of the issue of fact. He has done nothing under this provision, appearing at the General Term and resisting the reversal of the order of the Special Term, sustaining his demurrer to the answer of the respondent, did not assume the validity of the order of Justice INGRAHAM setting aside the judgment. It was necessary for the appellant to sustain his demurrer, whether the order of Justice INGRAHAM was properly granted or not. He must sustain the demurrer to uphold his right of recovery in either event. Sustaining the demurrer was a proceeding having no connection with or dependence upon that order. The counsel for the appellant insists, that as the whole merits are shown by the case, this court should determine, whether the order of Justice INGRAHAM was proper, the same as though such order had been reviewed upon its merits by the General Term. In this the counsel overlooks the incompetency of Justice INGRAHAM, so to review it. Had it been so reviewed and determined by a court in which he sat, it would have been the duty of this court, to reverse the order upon appeal, upon the ground that the court was not authorized to hear the case without considering, whether the determination was right or wrong, otherwise the provision of the Constitution would be wholly

nullified. It must be assumed that the General Term only entertained and passed upon the question, whether the appellant had waived his appeal, as that was the only question the court, as constituted, were authorized to determine; and having erred in determining that he had, the order dismissing the appeal, must be reversed with costs, and the appeal heard by the General Term authorized to hear and determine it.

All concur. Order reversed.

THEODORE E. HART, Appellant, *v.* HIRAM J. MESSENGER et al., Respondents.

Defendant M. purchased of plaintiff an individual bank, and he, with the other defendants as his sureties, executed to plaintiff a bond of indemnity from all claims of every kind against said bank. Prior to the transfer, certain depositors had received a promissory note to the amount of their claims against the bank, and the accounts had been balanced and closed upon the books of the bank. The note not being paid at maturity, the depositors offered to return it, and demanded payment of their respective accounts, claiming, among other things, that they had been induced to take the note by fraudulent representations of plaintiff. This state of affairs, plaintiff testified, was known to M. at the time of the transfer and giving the bond. Subsequently plaintiff was sued for the amount of the deposit balances due at the time of the receipt of the note. M., upon notice, employed counsel and defended the action; but the plaintiff in that action recovered judgment, which the plaintiff here paid. In a suit brought upon the bond, — *Held*,

1st. That, whether the judgment in the action against plaintiff, was recovered on the ground that the note was received by the depositors as conditional payment only, or that it was received as payment, but the agreement was rescinded on account of the fraud of plaintiff, in either view the case was brought within the letter and plain intention of the bond.

2d. That, if M. had knowledge of these outstanding claims, plaintiff was not concluded by the bank books; that the evidence offered was sufficient to require the submission of the question of knowledge to a jury; and a nonsuit was, therefore, error.

3d. That the rejection of testimony offered by plaintiff, tending to show M. had such knowledge, was error.

(Submitted June 21, 1871; decided September 2, 1871.)

Statement of case.

APPEAL from judgment entered in Ontario county upon order of the late General Term of the seventh judicial district, denying motion for new trial and directing judgment for defendant on verdict. (Reported below in 2 Lansing, 446.)

This action was brought upon a bond given by the defendants to plaintiff upon the purchase by defendant, Messenger, of plaintiff's interest in the bank of Canandaigua. The condition of the bond was, at all times, to keep "the said Hart clear from all liabilities, and save him, the said Hart, harmless from all claims, whatsoever, against the said bank of Canandaigua, both of bills or notes of said bank deposits and liabilities of all kinds." The bank of Canandaigua was an individual bank, established by the plaintiff and one John Mosher in 1854, under the banking laws of the State, and was owned and conducted by them until 1856, at which time William Curtis, acquired the interest of Mosher in the bank and became a partner of the plaintiff therein, and they conducted the banking business as such for a time, and then Curtis transferred his interest to the plaintiff, who individually, carried on the business until December, 1857, when he transferred an equal share to the defendant, Messenger, and they carried on the business as partners until 1863, when the plaintiff sold his remaining interest in the bank to him, and took the bond in question from him, and the other defendants as his sureties, as a part of the consideration of such transfer. During the time the business was conducted by the plaintiff and Curtis. Bushfield and several others kept an account with the bank, making deposits therein, and balances became due to them from the bank. These parties requested payment of the balances respectively due them; and the money not being paid, received from the bank a note made by one Shaffer, indorsed by another person, amounting to a sum sufficient to cancel the debt of the bank to them; and the note was charged in such portions to each as to balance the account of each, and the account closed. The Shaffer note not being paid at maturity, the parties who had received it, offered to return it to the bank, and demanded payment of the balance

of their respective accounts, alleging, among other things, that they had been induced to take the note by fraudulent representations of the plaintiff and Curtis. The bank refused to receive the note and to pay the balance. This was the situation of the affair, when Messenger first became interested in the bank, the latter claiming that the balances had been paid and satisfied by the Shaffer note; and the other parties denying that they had been paid, and insisted that the bank was still liable to them for the amount. The affair was in this situation, when the bond in suit was given to the plaintiff.

After the bond was given the other depositors assigned their claims to Bushfield; and after his decease his representative commenced an action against the plaintiff and Curtis, to recover the amount of the balances due at the time of the receipt of the Sheffer note. The plaintiff gave notice of the commencement of the action to Messenger, and he employed counsel and defended the action. The plaintiff in such action recovered judgment therein, which upon the refusal of the defendant to pay, was paid by the plaintiff.

Upon the trial plaintiff testified that Messenger, before the transfer and the giving of the bond knew of the claims; and that the parties owning them alleged, they were false representations made as to the responsibility of the maker of the note, and that a compromise of the claims was talked of.

The plaintiff offered to prove by other witnesses, that in the presence of Mr. Messenger, while he and the plaintiff were partners, these depositors and their agents offered to rescind the payment by the Sheffer notes, on the ground such notes had been turned out as good, but were utterly worthless, and demanded payment of their deposits; and that the nature of the claims, and the facts relating thereto, and the liability of the bank to the depositors, were frequently talked over between Hart and Messenger before the giving of the bond; that Hart claimed he thought the notes were good when he turned them out; that the notes were offered to the defendants on the Bushfield trial.

This evidence and every part thereof was objected to by

the defendants' counsel. The objection was sustained by the court, and the plaintiff's counsel then and there excepted.

The court ordered a nonsuit, and directed the exceptions to be heard at first instance at General Term.

E. G. Lapham, for appellant. Notice to Messenger, and his assuming the defence, charged all the defendants. (*Fay* v. *Ames*, 44 Barb., 327.) Plaintiff was not bound to make any defence to the action against him and Antis. (*Chase* v. *Hinman*, 8 Wend., 452.) Plaintiff's remedy is by action on the bond, and not for money paid. (Principal and Surety, 170; 2 Term Rep., 100; 8 Johns., 249.) Plaintiff was entitled to recover, on his liability being fixed by the judgment against him, without payment. (15 Wend., 503; 40 Barb., 235; id., 449; 1 N. Y., 550.)

H. O. Chesebro, for respondent.

GROVER, J. The bond given by the defendants to the plaintiff was conditioned, among other things, to save the plaintiff harmless and keep him clear from all liability for deposits made in the Bank of Canandaigua. The bank was an individual bank, and the plaintiff, from its commencement, having either been a partner or sole owner, was liable personally, either solely or jointly with his partner for the time, for all money due and owing to the depositors of the bank. It was the intention of the bond to protect the plaintiff against this liability, and the plaintiff received it for that purpose. The complaint in the action of Sarah Bushfield, executrix, against the plaintiff and William Antis, and the other proceedings in that action, which were given in evidence upon the trial of the present action, show that that action was brought, to recover money due to plaintiff's testator and to others who had assigned their demands to her, for money deposited in the bank while owned by the plaintiff and Antis. The contest upon that trial was, whether the deposits were paid in the note of Sheffer, the defendants therein

insisting that the note was received as payment, and that Messenger and Antis were free from fraud in the transaction, while the plaintiff insisted that the defendants therein, had warranted that the note was good and would be paid at maturity, and that it was taken conditionally as payment in case it was paid by the parties liable thereon, and further, that the defendants made fraudulent representations in regard to the solvency of the maker and indorser, to induce the testator and the others to take the note, upon the discovery of which and of the notes being worthless, they tendered the note to the defendants and demanded payment of the money due to them respectively. The jury, by their verdict for the plaintiff, found one or the other of these positions to be true. The defendant Messenger, having had notice and assumed the defence of the action, was concluded by this verdict. Upon either assumption, the deposits claimed by Mrs. Bushnell had not been paid. If the note was received as a conditional payment, in case it was paid, it clearly was not a payment, as there was no pretence that the note, or any part of it, had ever been paid. If received as an absolute payment, and the parties were induced so to receive it by the fraudulent representations of Messenger and Antis as to the solvency of the parties liable for its payment, the parties so receiving it had the right, upon discovering the fraud, to return or tender the note, rescind the agreement, and recover the money due them as depositors. This tender of the note was made, and the jury have found, either that an agreement was made to receive the note as payment, which was rescinded for the fraud of plaintiff and Antis, or that it was received as conditional payment only. In either case the deposits had not been paid, and the plaintiff was liable for such payment, which he had been compelled to make by the judgment of the court. The plaintiff thus brought his case directly within the letter and plain intention of the bond; and in the absence of further proof, a right of recovery thereon was established. But the court upon trial assumed, and the assumption appears to have been warranted, that books were kept by the bank show-

ing the amount of circulating notes outstanding, and all liabilities for unpaid deposits. That these books were regarded as representations of the plaintiff of the sums due depositors, and that the plaintiff could not, therefore, recover for such liabilities not appearing upon the books or otherwise made known to the plaintiff. This conclusion was correct. The representation of the plaintiff as to what were the liabilities to depositors, when acted upon by Messenger by giving the bond, would estop the plaintiff from showing that there were further liabilities of the same character. The books of the bank showed that the deposits in question had been paid in the Sheffer note, and that nothing was due thereon. Thus a defence in the absence of further proof was established. The question is, whether the additional proof given by the plaintiff was a sufficient answer to it, or created such a doubt as to the truth of any material fact, upon which it was based, as to require the submission of the question to the jury. The plaintiff, among other things, testified that the claims embraced in the action of Bushnell against him and Antis, were made to him in Messenger's presence. That he knew what the nature of the claims was and how they arose. We talked the matter over together before the execution of the bond by the defendants. This witness further testified, that the parties all came to the bank and demanded their money; and it was well understood that these claims existed when I sold out to Messenger. He and I talked of compromising the claims before the bond was given. The evidence was sufficient to require the submission to the jury of the question, whether the plaintiff did or did not know that the claims for unpaid deposits, upon which the Bushnell judgment was subsequently recovered existed, and were insisted upon at the time of giving the bond, notwithstanding they appeared by the books to have been paid. This was corroborated by the fact of Messenger's assuming, without question, the defence of the Bushnell suit, upon being served with notice of its commencement. We have seen that the bond included all liabilities for unpaid deposits. There was no evidence showing that Messenger

acted in giving the bond upon the representation of the plaintiff, that these claims for unpaid deposits, though insisted upon, had in fact, no existence. The plaintiff was not, therefore, estopped from proving that they were not only made, but were well founded. This was proved by the judgment. The learned judge erred in nonsuiting the plaintiff. He also erred in rejecting the testimony of witnesses offered by the plaintiff tending to show that Messenger knew the facts in regard to these claims, and the grounds upon which they were based prior to giving the bond. It appears, from the prevailing opinion given at the General Term, that that court affirmed the judgment upon the ground, that the Bushnell judgment was for damages sustained by the fraudulent representations of Messenger and Antis, as to the solvency of the parties liable for the payment of the Sheffer note, and that the bond did not include damages sustained from frauds practiced by Messenger and Antis. The conclusion was correct. The error was in the premises. The judgment was recovered for unpaid deposits. The evidence of fraudulent representations was given not as a basis for damages, but to show that by reason of the fraud, the agreement to receive and the receipt of the note did not effect the payment of the money deposited. The judgment appealed from must be reversed and a new trial ordered, costs to abide event.

All concur save FOLGER, J., not voting.

Judgment reversed.

JOHN K. VAN SLYKE, Appellant, *v.* THADDEUS HYATT, Respondent.

The right of a party in a case tried by a referee, to have separate findings of fact and conclusions of law, is a substantial one.

Where a referee has failed to pass upon material questions of fact and law, the proper practice is to apply to the court, to send the case back to the referee, to pass specifically upon such questions or to re-settle his report. Should the application be denied, upon an appeal from the judgment, the

proceedings to obtain further findings, can be inserted in the record, and the materiality of the findings asked for, can be determined at General Term or in this court upon the appeal.

In such a case the presumption, that all material facts of which there was evidence have been found against the appellant, will not apply in respect to those matters as to which he has sought to obtain specific findings, but they will be regarded in the same manner as facts, which upon trial, the court has refused to submit to the jury.

Plaintiff, instead of adopting this course, moved to set aside the report, "or for such other or further order as should be proper;" which motion was denied.

Held, that the order did not necessarily dispose of the right of plaintiff to further findings, but was simply a ruling upon a question of practice, as to the mode of obtaining relief; that it was discretionary with the court to grant the appropriate relief, under the words in the notice "for such other and further order," etc., and that the order was not appealable.

There is no sufficient ground in any case, for entertaining an appeal in this court before judgment from an order in respect to findings.

(Argued March 21, 1871; decided April 11, 1871.)

APPEAL from an order of the Supreme Court at General Term, affirming an order at Special Term, denying the plaintiff's motion to set aside the report of the referee, and for such further or other order as should be proper. (Reported below, 9 Abb., N. S., 58.)

The complaint in the action set forth various loans of money and negotiable paper, and also a sale of merchandise, made by one Covert to the defendant. That on account of said matters, the defendant was indebted to Covert, and that Covert had assigned his claims to the plaintiff.

The answer denied any indebtedness to Covert or to the plaintiff, and as to all allegations in the complaint not specifically answered, denied any knowledge or information sufficient to form a belief. It also set up, that before and at the time of the commencement of the action, Covert was indebted to the plaintiff for money lent to Covert at his request, in a sum exceeding the amount claimed in the complaint.

The plaintiff replied to the latter part of the answer by a general denial.

NOTE.—This case was accidentally omitted in its order in 6 Hand.—REP

Statement of case.

The referee made his report, containing no findings of fact or conclusions of law, except the following:

As matters of fact: First, that at the time mentioned in the complaint, the defendant was not indebted to Covert in any sum whatever; second, that the defendant is not indebted to the plaintiff, as alleged in this action.

And as a conclusion of law that the defendant is not indebted to the plaintiff, as alleged in this action, and is entitled to judgment against the plaintiff for his costs.

The defendant moved, at Special Term, for an order setting aside this report for irregularity, in this, that the referee had not, in his report, stated the facts found, if any, and for such other or further order as should be proper in the premises.

This motion was made upon an affidavit of the defendants' attorney, setting forth the proceedings in the action and stating, that it was tried before the referee, testimony taken, and evidence introduced before him on all the issues raised by the pleadings; that the counsel for the respective parties made their argument before the referee, and submitted the case for decision, but that he had wholly failed to determine the issues of fact or to state any findings of fact whatever. That deponent believed the referee's decision to be contrary to and unsupported by the evidence; but that in the form in which the referee's decision and report was made, it was impossible to obtain a review of his decision, or a correction of his supposed errors.

The defendant's motion was denied at Special Term; and on appeal to the General Term the order was affirmed on the ground, that the motion should have been to correct the report and not to set it aside.

From this determination of the General Term the present appeal is taken.

C. Cheney, for appellant. The order affects a substantial right, and is appealable. (*Matthews* v. *Jones*, 1 E. D. Smith, 429.) Either party is entitled to the findings required by section 272 of Code. (*Wright* v. *Saunders*, 28 How., 395,

396; *Hulce* v. *Sherman*, 13 How., 411; *Rogers* v. *Beard*, 20 How. Pr. Rep., 282-285; *Peck* v. *York*, 14 How. Pr. Rep., 416; *Leffler* v. *Field*, 33 How. Pr. Rep., 390; *Tilman* v. *Keane*, 1 Abb. Rep. N. S., 23; *Snook* v. *Fries*, 19 Barb., 313.) Under the clause in notice "for such other or further order," etc., the court should have sent report back with directions to state his findings. (*Blake* v. *Eldred*, 18 How. Pr. R., 240-243; *Bonigton* v. *Lapham*, 14 How. Pr. R., 360-363; *Ridder* v. *Whitlock*, 12 How. Pr. R., 208-214; *Martin* v. *Kanouse*, 2 Abbott, 390; *Hecker* v. *Mitchell*, 5 Abbott, 454; *Barstow* v. *Randall*, 5 Hill, 518.)

A. Monell, for respondent. A referee is only required to find facts necessary to sustain judgment. (*Nelson* v. *Ingersoll*, 27 How., 1; *Sermont* v. *Bætgen*, 49 Barb., 362.) The omission of appellant to request findings upon the desired points is fatal. (*Grant* v. *Morse*, 22 N. Y., 323; *Ashley* v. *Marshall*, 29 N. Y., 494; *Brainard* v. *Dunning*, 30 N. Y., 211.) A referee's decision after judgment can only be reviewed by appeal therefrom. (Laws of 1849, p. 680, § 323; *Enos* v. *Thomas*, 5 How. Pr., 361, Supreme Ct., 1850; *Comstock* v. *Rathbone*, 1 Johns., 138.)

RAPALLO, J. The frequency of appeals to this court, under the fourth subdivision of section eleven of the Code, from orders involving mere questions of practice, admonishes us, that unless we rigidly confine such appeals within the limits prescribed by that section, we shall be continually called upon to determine controversies in regard to modes of procedure in the courts below; and the time of this court will be thus consumed, to an extent, totally incompatible with the discharge of its more important duties.

We must therefore, in all such cases, dismiss the appeal, unless it clearly appears, that the determination sought to be reviewed has deprived the appellant of a substantial right, instead of simply affecting the mode of obtaining relief.

It was doubtless the right of the plaintiff to have separate findings of fact and conclusions of law inserted by the referee

in his report. This right is secured by statute, and it is substantial, inasmuch as these findings and conclusions, enable the unsuccessful party to determine whether or not to appeal; and in case he desires to appeal, they are indispensable to enable him to frame and serve his exceptions in due time, and to present the case in proper form for review. (*Tilman* v. *Keane*, 1 Abb. N. S., 24; *Rogers* v. *Beard*, 20 Howard Pr., 282.) The decision to the contrary in *Johnson* v. *Whitlock* (13 N. Y., 344), was based upon the then existing provisions of section 267 of the Code, relating to trials by the court. But the amendment of that section adopted in 1860 removes the foundation of that decision.

The report should contain a sufficient statement of facts, to form a basis for the conclusions of law, and substantially show the disposition made by the referee of the specific issues in the cause, or of such of them as are embraced in his determination. A mere general conclusion of indebtedness or no indebtedness, is not a sufficient compliance with the provision of the Code, and serves none of the purposes for which it was intended.

It has been repeatedly held, however, that the insufficiency of the findings is not, of itself, a ground for the reversal of the judgment on appeal; but that the party desiring a review must procure such findings as will raise the questions of law, which he desires to present to the appellate court. (*Brainard* v. *Dunning*, 30 N. Y., 211; *Smith* v. *Coe*, 29 N. Y., 666; *Grant* v. *Morse*, 22 N. Y., 323; 13 How. R., 411; 20 Howard Practice R., 282.)

It is obvious, therefore, that unless he can obtain proper findings, the defeated party is deprived of the substantial advantages of an appeal.

But it does not appear in this case that the plaintiff's right to such findings was denied by the court below. Its decision simply was, that it would not set aside the report on account of the insufficiency of the findings. The motion was to set aside the report, and for such other or further order as should be proper.

The denial of that motion is not equivalent to the denial of a motion for further findings.

The decision in *Tilman* v. *Keane* (1 Abb., N. S., 24), rendered by the same learned judge who delivered the opinion of the court in this case at General Term, shows that, if the motion had been for further findings, or to send back the report for correction, it would have probably been granted.

There are some cases in the books, in which the report has been set aside as irregular for want of any findings of fact. (1 Code Rep., 54; id., 121; 4 Sandf. S. C., 691; 33 How. Pr., 385.) But where the objection is to the sufficiency of the findings, it has been often held, that application should be to correct the report by inserting further or more specific findings. (13 How. Pr., 411; 6 id., 492; 20 id., 285; 19 Barb., 313; *Lefler* v. *Field*, 50 id., 407; 30 N. Y., 211, 216.) Whether the remedy in this case should have been sought in one form or the other, was a mere question of practice, the determination of which, did not necessarily dispose of the right of the plaintiff to further findings.

It is claimed, however, that under the words, "and for such other and further order," etc., in the notice of motion, the court should have granted the relief to which the plaintiff was conceded to be entitled. It undoubtedly might have done so with great propriety, either at Special or General Term, as the moving affidavit clearly disclosed the occasion for such relief. (*People* v. *Supervisors of Delaware Co.*, March, 1871.) But we cannot say that it was a legal error, reviewable in this court, not to exercise that power. If a party has mistaken the practice, and moved for an order to which he was not entitled, it must, in general, be discretionary with the court, whether to grant other relief under these general words, or to deny the motion.

When a motion is thus denied, the party is at liberty to make a new motion for the proper relief (5 Abb., N. S., 277, *Hall* v. *Emmons*, Court of App., Oct., 1870); and that course is much more appropriate than an appeal.

But there is no sufficient ground in any case for entertain-

ing an appeal to this court, before judgment, from an order in respect to findings. Until the whole case is before this court, the materiality of findings upon particular issues cannot conveniently be examined. It seems to us that the proper practice, where the referee has failed to pass upon material questions of fact or of law, is to apply to the court before the time for excepting has expired, to send the case back to the referee, to pass specifically upon such questions or to re-settle his report; and the materiality of the desired findings should, on such application, be shown to the court. The entry of judgment should be stayed, or the time to except extended, until the application is disposed of. Should the application be denied, and should an appeal be taken from the judgment, the proceedings to obtain further findings can be inserted in the record, and the materiality of the findings asked for and refused, can be determined at General Term and here, on a review of the whole case.

When the defeated party has thus endeavored to obtain proper findings, the presumption, made in ordinary cases, that all material facts of which there was evidence have been found against him, will not apply in respect to the matters as to which he has sought to obtain specific findings; but those matters will be regarded in the same manner as facts which, upon a trial, the court has refused to submit to the jury, and the consequences of such refusals can then be considered.

This appeal should be dismissed, with costs.

All concur.

Appeal dismissed.

JACOB BENDETSON, Appellant, *v.* RICHARD FRENCH, Respondent.

Plaintiff, a guest in defendant's hotel, offered to the book-keeper a large package containing jewelry, and without stating its contents, requested him to deposit it in the safe. The book-keeper replied that it was not necessary, and requested plaintiff to take it to his room, saying, it would be just as safe there. When plaintiff was ready to leave, he packed his trunk, in which the package then was, delivered up the key of his room to the hotel clerk, and requested the trunk to be brought down immediately. This was not done; and upon plaintiff's calling for it shortly after it was found broken open and the package stolen.—*Held*, that defendant could not be held responsible for a refusal to receive; but that there was a "neglect to deposit" within the meaning of the innkeepers' act of 1855. (Laws of 1855, chapter 421.)

That said act, however, only relieves the hotel proprietor from losses occasioned by such neglect; and that, as in this case, the loss happened at a time when the package, if it had been deposited, would have been returned to the guest to be packed prior to departure, defendant was liable.

(Argued June 21st, 1871; decided September 5th, 1871.)

APPEAL from an order made by the Supreme Court at General Term in the first district, reversing judgment in favor of plaintiff, entered upon the report of a referee, and granting a new trial. (Reported below, 44 Barb., 31.)

The action was against the defendant, a hotel proprietor, to recover the value of watches, jewelry, etc., claimed to have been stolen from the plaintiff's room in October, 1861, while he was a guest in the inn.

In October, 1861, the defendant was the proprietor of and kept an inn, known as French's Hotel, in the city of New York; and the plaintiff was a guest therein from the fourth, to and including the eighth of October.

The plaintiff arrived in New York on the fourth of October from Rio Janeiro; and on that day, before going to the hotel, he delivered a part of the jewelry, etc., in question, to a custom-house officer with a view to paying the duty thereon.

On the seventh of October he paid duty on the watches, jewelry, etc., and received the same from the custom-house officers.

On the morning of the eighth of October, the plaintiff had the aforesaid watches and jewelry and other valuables in a box wrapped in oilcloth and tied with a cord, constituting a package sixteen inches long, ten inches wide, and about seven inches high. He presented the same to the clerk or book-keeper of the defendant, at the office of the hotel, and requested him to place the same in the safe for valuables, which was in the office; the book-keeper then told him there was no necessity for that, and directed him to take the package to his, plaintiff's room, saying it would be just as safe there. Thereupon the plaintiff took the package to his room, placed it in his trunk, which he locked, and then locked his room, and delivered the key of his room to the clerk in the office, and left the hotel to attend to some business in the city.

When the plaintiff offered the package to and requested the book-keeper to place it in the safe, the book-keeper made no inquiry as to the contents of the package, nor did the plaintiff make any statement as to such contents.

The plaintiff resided at Syracuse, and intended to leave for that city on the afternoon of October eighth. He returned to the hotel about one o'clock in the afternoon, and went to his room and packed and locked his trunk containing said package, which was then safe. He then locked the door of his room and delivered the key to the book-keeper, at the office, and stated to him that he intended to leave for Syracuse by the first train, and ordered his trunk to be brought down immediately, his bill to be made out, and that he would return in a few minutes and pay it.

The plaintiff then went into an eating saloon in the basement of the hotel. In a few minutes he returned to the office, paid his bill and inquired for his trunk, and learned that it had not been brought from his room.

The plaintiff then went with a porter of the hotel to his room for his trunk, and upon unlocking the door of the room

it was found that the room had been entered, the trunk broken open, and the watches, jewelry, etc., stolen.

The defendant kept a safe in the office for the deposit of jewelry, valuables, etc. This the defendant knew prior to the eighth of October. The rules and regulations and notice required by chapter 421, Laws of 1855, were hung up in the room occupied by plaintiff.

The value of the articles stolen was $1,856; and for this amount, with interest, judgment was ordered.

F. Kernan, for appellant. The referee's findings of fact are conclusive. (Code, § 268; *Marco* v. *L. and L. Ins. Co.*, 35 N. Y., 664; *Fellows* v. *Northrup*, 39 N. Y., 117; *Mason* v. *Lord*, 40 N. Y., 477; *Putnam* v. *Hubbell*, 42 N. Y., 106, 113.) Such other facts as the evidence tended to prove, will be assumed to sustain the referee's conclusions of law. (*Chubbuck* v. *Vernam*, 42 N. Y., 432; *Grant* v. *Morse*, 22 N. Y., 323-325; *Carman* v. *Pulte*, 21 N. Y., 547.) On the facts found defendant was liable. (2 Kent's Commentaries, p. 593, 1st ed., p. 785, 11th ed; Story on Bailments, § 470, etc.; *Hulett* v. *Swift*, 33 N. Y., p. 571; *Piper* v. *Manny*, 21 Wend., 282; *Grinnell* v. *Cook*, 3 Hill, 485; *Clute* v. *Wiggins*, 14 J. R,, 174; *Wilkins* v. *Earle*, decided by Commission of Appeals, January Term, 1871, reversing decision of Superior Court, reported 19 Abbott, Pr. R., 190; *Kent* v. *Shuckard*, 2 Barn. & Adolph., 803; 1 Smith's Lead. Cases, 309; Coyle's Case, 8 R., p. 33; *Piper* v. *Manny*, 21 Wend., 282-284; *Purvis* v. *Coleman*, 21 N. Y., 111, 116; *Richmond* v. *Smith*, 8 Barn. & Cress., 9.) The fact that plaintiff did not state contents of package when he presented it to the clerk, does not exonerate defendant. (2 Kent's Commentaries, p. 594, 1st ed.; 787, 11th ed.; Story on Bailment, § 479; *Kellogg* v. *Sweeney*, 1 Lansing, 398; *Wilkins* v. *Earle*, 19 Abbott, Prac. R., dissenting opinion and cases cited, p. 203, 205, 207, and cases cited; *Fowler* v. *Dorlon*, 24 Barb., 384, 389; *Keegan* v. *H. & R. R. Co.*, 8 N. Y., 175.) As the package was safe until packed for departure, defendant was as fully respon-

sible as if package had been deposited in safe. *Stanton* v. *Leland*, 4 E. D. Smith, 88, 92.)

S. P. Nash, for respondent. The act of 1855 has reference only to "money, jewels, and ornaments." (*Hyatt* v. *Taylor*, 42 N. Y., 258.) The guest should, therefore disclose, that package offered for deposit contains these articles. (*Gibbon* v. *Paynter*, 4 Burr., 2298; *Pardee* v. *Drew*, 25 Wend., 459; *Richards* v. *Westcott*, 2 Bos., 589; *Warner* v. *W. S. Co.*, 5 Robt., 490; *Purvis* v. *Coleman*, 21 N. Y., 111.)

By the Court — PECKHAM, J. The statute provides, that if a "guest shall neglect to deposit such money, jewels, or ornaments in such safes (the safe required to be kept by the hotel keeper), the proprietor of such hotel shall not be liable for any loss of such money, jewels, or ornaments, sustained by such guest, by theft or otherwise." (Laws of 1855, p. 774.)

The first question that arises here is, did the plaintiff neglect to deposit his money, jewels and ornaments, in the safe which he knew the defendant kept for that purpose?

The referee has found (and not without evidence) that the plaintiff, in the forenoon of the day he left the hotel, "presented to defendant's book-keeper a package sixteen inches long, ten inches wide, and seven inches high, wrapped in an oil cloth, and tied up with a strong cord, and requested him to put said package in the safe; that the book-keeper told plaintiff there was no necessity for that; to take it to his (plaintiff's) room; saying it would be just as safe there."

This package contained the jewels and ornaments sued for; but the plaintiff did not state its contents, nor did the book-keeper inquire what it contained.

I think this was a "neglect to deposit," within the meaning of the statute. The book-keeper did not know that money, jewelry or ornaments had been offered him. Hence, he did not refuse to receive them. Suppose this package had been of the size of an ordinary trunk; would the clerk have been compelled to receive it? Clearly not; because, first, there

was nothing to notify him that it contained money, etc.; second, so large a package was not within the meaning of the statute; no safe would probably have apartments to receive it. There was nothing about this package to indicate that it was not appropriately sent to the room of the guest. The defendant should not be held to the responsibility of refusing to receive money, jewels, etc., unless he did it knowingly. It is not so found, nor is there any evidence to prove such a fact.

The burden rests with the guest to make this deposit. He neither made nor offered to make it, within the meaning of the statute.

Simply offering a package of this size, without disclosing its contents, is not offering to deposit money, jewels, or ornaments.

Had the clerk been made aware of the contents of the package, and had then directed it to be taken to the plaintiff's room, he would have waived the protection of the statute.

It is also insisted that, after this jewelry, etc., was packed, and notice given to the clerk to bring the trunk down immediately, with the intent to leave the hotel, defendant is liable for any loss thereof, thereafter occurring in the hotel, whether the jewelry had been deposited in the safe or not.

The statute is very broad in its language, that, "if such guest shall neglect to deposit, etc., the proprietor shall not be liable for any loss of such money, etc., sustained by such guest, by theft or otherwise."

This was evidently aimed at losses that should occur by such neglect. It could have no reference to losses at the inn, occurring before the guest had the opportunity to make such deposit, or after he had packed his trunk, locked his room, and given notice for immediate departure, etc., delivered up the key of his room to the clerk, to have his trunk brought down. (*Stanton* v. *Leland*, 4 E. D. Smith, 88.)

Had the valuables been in the custody of the clerk in the safe, they must have been delivered to the guest to be packed prior to his departure, and if lost thereafter without the fault of the guest, the landlord would be liable.

The liability of the landlord is discharged, so far as the remedy is applied; so far as the peril is removed. It should not extend, and was never designed to extend, any further.

It may be remarked, that a considerable portion of the property recovered for, was neither money, jewels, or ornaments, and hence, the landlord was not exempt from liability for the loss thereof, under this statute. It was neither within the statute or the notices posted in the hotel.

In the view taken of this case, the exceptions taken to the exclusion of evidence become immaterial.

Purvis v. *Coleman* (21 N. Y., 111), has no application to this case.

The order for a new trial is reversed, and the judgment upon the report of the referee is affirmed, with costs.

All concur, except ANDREWS, J., not voting.

Judgment accordingly.

JAMES L. LAMB and others, Respondents, *v.* THE CAMDEN AND AMBOY RAILROAD AND TRANSPORTATION COMPANY.

Plaintiffs shipped at Cairo, Ill., by the Illinois Central Railroad a quantity of cotton, consigned to S. W. & Co., New York. In the bill of lading given by the I. C. R. R. Co. its agent was named as consignee at Chicago. The bill of lading exempted that company from "damage or loss by fire," and also, from all responsibility for the safety or safe carriage of the packages beyond the line of its road, but stipulated that the through rate should be two dollars per 100 pounds. The I. C. R. R. Co. contracted for the transportation from Chicago to New York with the U. T. Co. The bill of lading containing a similar exemption from loss or damage by fire, and, also a stipulation, that in case of loss the latter company should be liable only for the value of the property at the time of shipment. The cotton was received by defendants at Philadelphia; transported to New York, and while in their custody upon their pier was destroyed by fire.—*Held*,

1st. That the contract with the I. C. R. R. Co. was not a through contract; but under it, that company had power to contract for the transportation beyond the line of its road, and to provide in such contract, for a like exemption of the subsequent carrier, as that contained in its own

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contract with plaintiffs. It had no power, however, to bind the latter by any stipulation not embraced in that contract.

2d. That the exemption from damage or loss by fire, did not exonerate defendant from a loss so happening, in case the fire resulted from its own negligence.

3d. That plaintiffs, to maintain their action must show affirmatively, such negligence..

A ruling therefore of the court upon the trial, that the burden of proof was on the defendant, to show the fire was not caused by any negligence on its part, and a similar charge to the jury was erroneous. (PECKHAM and ALLEN, JJ. dissenting.)

(Argued June 8th, 1871; decided November 10th, 1871.)

APPEAL from judgment of the General Term of the New York Common Pleas, affirming a judgment entered upon a verdict in favor of plaintiff, and also, affirming order denying motion for new trial. (Reported below, 2 Daley, 454.)

The action is brought against defendant as a common carrier, to recover damages for the non-delivery of a quantity of cotton.

The defendants are common carriers by railroad and steamboat between Philadelphia and New York.

Seven hundred and ninety bales of cotton were shipped by the plaintiffs, June 25, 1864, at Cairo, Illinois, on the Illinois Central railroad. The Illinois Central issued its receipts or bills of lading for this cotton. These acknowledge the receipt of the cotton, "consigned to James Warrack, agent, Chicago," marked, "Sawyer, Wallace & Co., New York," and provide that "it is especially understood, that for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only in whose custody such packages may actually be at the time of the happening thereof; it being understood that the said Illinois Central Railroad Company assumes no other responsibility for their safety, or safe carriage, than may be incurred on its own road;" and that the through rate shall be two dollars per 100 pounds, and providing that "the company are not responsible for damage or loss by fire."

This cotton was carried by the Illinois Central to Chicago,

and there delivered by that company to the Union Transportation and Insurance Company, to be further transported. The latter company issued its receipts or bills of lading therefor, which were delivered to James Warrack, who was the agent of the Illinois Central at Chicago, and by him forwarded to the Illinois Central at Cairo. These contained exemptions and reservations in substance the same as the Cairo bills, and in addition this clause: "When losses occur for which the carriers may be responsible under the bill of lading, the cost or value of the property at the date of shipment shall govern the settlement of the same."

This cotton, excepting one bale, not accounted for, was delivered by the Union Transportation to the defendants, at Philadelphia.

Of these 789 bales received by the defendants, all were delivered by them at New York, except 137 bales. These 137 bales were destroyed by fire, while in defendants' custody, at their pier, in the city of New York, which fire destroyed defendants' boats, pier, and all the goods therein contained.

This fire occurred on the night of Sunday, July 10, 1864. It originated on the defendants' steamboat John Potter, one of three steamboats owned by defendants, and that night all moored to the pier.

After proving that the loss had occurred by fire, the defendants proposed to rest their case; but the court having expressly ruled, in effect, that they would not be exonerated under the provisions of the bills of lading by proof, that the loss was occasioned by fire, unless they also showed that such destruction by fire was not occasioned by negligence on their part, (to which ruling exception was duly taken) further evidence was offered by defendants, tending to show that due precaution was taken and care exercised to prevent the occurrence and to stay the progress of fire.

At the close of the testimony, the defendants requested the court to charge, "that the defendants are not liable in this action, unless the destruction of the cotton is proved to have been caused by the defendants' negligence or default." This

the court refused, but charged, among other things, that the defendants "were not relieved from the burden of satisfying the jury that the loss, which it is beyond doubt, happened by fire, was not occasioned by negligence on their part."

The court also charged, that while the defendants were entitled to the benefit of the several restrictive clauses contained in the Chicago bills of lading, limiting their liability as common carriers, the particular provision of such bills of lading, whereby the measure of damages in case of loss, was limited to the cost or value of the property at the time of shipment, would not avail them, for the reason that such provision was only applicable in cases of voluntary settlement, and not in case of litigation.

The jury rendered a verdict for plaintiffs for $81,618.07. Judgment was entered October 22, 1866.

C. F. Sanford, for appellant. Defendants were entitled to the exemptions in the Cairo bill of lading. (*Stoddard* v. *Long Island Railroad Co.*, 5 Sand., p. 180; *Moriarty* v. *Harnden's Express*, 1 Daly, 227; *Maghee* v. *Camden and Amboy Railroad Company*, General Term, Supreme Court; *Manhattan Oil Company* v. *Camden and Amboy Railroad Company*, 5 Abb. Pr. R. N. S., 289, and note; 52 Barb., 72; *McMillan* v. *Mich. S. R. R.*, 16 Mich., 79, 123; *Heffron* v. *The Same*, id., p. 131.) The burden of proof was upon plaintiff to show, affirmatively, the loss was the result of defendants' negligence. (*Memphis and C. R. R. Co.* v. *Reeves*, 10 Wall., 176; *W. T. Co.* v. *Donner*, U. S. Sup. Court, N. Y. Trans., May 27, 1871; Story on Bailments, § 557; Angell on Carriers, § 247; *Nicholson* v. *Wilson*, 5 East R., 507; *Moving* v. *Todd*, 1 Stark, 72; *Harrison* v. *Packwood*, 3 Taunt., 371; *Phelps* v. *Williamson*, 5 Sandford, 578; *Mercantile Mut. Ins. Co.* v. *Chase*, 1 E. D. Smith, 115; *Parsons* v. *Monteath*, 13 Barb., 353; *Moore* v. *Evans*, 14 Barb., 526; *Meyer* v. *Harnden's Ex. Co.*, 24 How Pr. R., 290; *Dorr* v. *New Jersey Steam N. Co.*, 4 Sandf., 136; 1 Kern., 485; *Stoddard* v. *The Long Island R. R. Co.*, 5

Sandf., 180; *Mercantile Mut. Ins. Co.* v. *Calebs*, 20 N. Y., 173; *Moriarty* v. *Harnden's Express*, 1 Daly, 227; *Camden and Amboy R. R. Co* v. *Baldauf*, 16 Penn. R., 67; *Bingham* v. *Rogers*, 6 W. & S., 495; *Beckman* v. *Thouse*, 5 Rowle, 179; *Farmers' and Merchants' Bank* v. *Champlain Trans. Co.*, 23 Verm., 186; *Marsh* v. *Horn*, 3 Barn. & Cress, 322; *Beekman* v. *Thouse*, 5 Rawle., 179; *Clark* v. *Spence*, 10 Watts, 335; *Runyon* v. *Caldwell*, 7 Humph, 134; *Newton* v. *Pope*, 1 Cow., 169; *Schmidt* v. *Blood*, 9 Wend., 268; *Foot* v. *Stork*, 2 Barb., 326, *Worington* v. *Snyder*, 3 Barb., 380; *Brush* v. *Miller*, 13 Barb., 489; *Clay* v. *Williams*, 1 H. Bl. R., 298; *Levie* v. *Waterhouse*, 1 Price, 280; *Gilbert* v. *Dole*, 5 Ad. & Ellis, 540; *Neustadt* v. *Adams*, 5 Duer, 43; *Logan* v. *Matthews*, 6 Barr, 417; *Skinner* v. *London, Brighton, and South Coast Railway Co.*, 2 E. L. & E., 360; *Bush* v. *Miller*, 13 Barb., 481; *Fenn* v. *Timpson*, 4 E. D. Smith, 453; *Neustadt* v. *Adams*, 5 Duer, 43; *Arent* v. *Squire & Johnston*, 1 Daly, 347; *Clark* v. *Barnwell*, 12 How., U. S., 272; *French* v. *B. and N. Y. R. R. Co.*, 4 Keyes, 108.)

W. F. Shepard & L. Marsh, for respondent. The contracts with the Illinois Central Railroad Company are limited to that company, and do not inure to the benefit of subsequent carriers. (*Van Santford* v. *St. John*, 6 Hill, 157; *Baldwin* v. *U. S. Telegraph Co.*, 1 Lansing, 125, 129; *Farmers' and Mechanics' Bank* v. *Champlain Transportation Company*, 18 Vermont, 131; *Farmers' and Mechanics' Bank* v. *Champlain Trasportation Company*, 23 Vermont, 186, 209; *Hood* v. *N. Y. and New Haven R. R. Co.*, 22 Conn., 1; *Elmore* v. *Naugatuck R. R. Co.*, 23 Con., 457; *Naugatuck R. R. Co.* v. *Waterbury Button Co.*, 24 Conn., 468; *Converse* v. *Norwich and N. Y. Trans. Co.*, 33 Conn., 166; S. C., 6 Am. Law Reg. N. S., 214; *Nutting* v. *Conn. R. R.*, 1 Gray, 502; *Burroughs* v. *N. and W. R. R.*, 100 Mass., 26; *Pendegast* v. *Adams' Ex. Co.*, 101 Mass., 120: *Perkins* v. *Portland*, 47 Maine, 573; *McMillan* v. *Mich. etc., R. R.*,

16 Mich., 119; *Jernuson* v. *C. and A. R. R. Co.*, 4 Am. Law, Reg., 234; *Rome R. R. Co.* v. *Sullivan*, 25 Ga., 228; *Collins* v. *B. and E. R.*, 36 Eng. L. & E., 482; *Schneider* v. *Evans*, 9 Am. Law Reg., 536; *C. and A. R. R. Co.* v. *Forsyth*, 11 Penn., 81.) The Chicago bills of lading are not binding on plaintiffs. (*Ladue* v. *Griffith*, 25 N. Y., 364; *Baldwin* v. *U. S. Telegraph Co.*, 1 Lansing, 125, 130.) Under a through contract the subsequent carriers liable to the owner. (*N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 How. U. S., 344; *Stoddard* v. *L. I. R. Co.*, 5 Sand., 188; *Wing* v. *N. Y. and E. R. R. Co.*, 1 Hill, 235.) It was incumbent on defendant to show, the loss occurred without negligence on their part. (*Alexander* v. *Greene*, 7 Hill, 533; *Wells* v. *Tucker*, 4 Seld., 375, 380; *New Jersey Steam Nav. Co.* v. *Merchants' Bank*, 6 How. U. S. R., 344; *Hooper* v. *Wells*, 5 Am. Law Reg., 16; *Smith* v. *N. Y. C. R. R.*, 29 Barb., 132; *Michaels* v. *N. Y. C. R. R.*, 30 N. Y., 564; *Reed* v. *Spaulding*, 30 N. Y., 630; *Wing* v. *N. Y. and E. R. R.*, 1 Hill, 235; *Steinway* v. *Erie R. R. Co.*, Ct. Appeals, N. Y. Trans., April 17, 1871; *Simmons* v. *Law*, 3 Keyes, 217, 221; *French* v. *B. and E. R. R. Co.*, 4 Keyes, 106; *Turney* v. *Wilson*, 7 Yerger, 340; *Whiteside* v. *Russell* 8 W. & T., 44; *Roberts* v. *Riley*, 15 La., 103; *Fairchild* v. *Slocum*, 7 Hill, 292, 297; *Parsons* v. *Monteath*, 13 Barb., 353; *Weaver* v. *Birchard*, 40 Vermt., 326; 1 Parsons on Con., 606; Story on Bailment, § 410; *Schmidt* v. *Blood*, 9 Wend., 286; *Beardsley* v. *Richardson*, 11 Wend., 25; *Bush* v. *Miller*, 13 Barb., 481; *Platt* v. *Hibbard*, 7 Cow., 497; *Logan* v. *Matthews*, 6 Barr., 417; *Swindler* v. *Hilliard*, 2 Rich., 286; *Arent* v. *Squire*, 1 Daly, 347.) Defendants' proof of losses by fire raises presumption of negligence, and charge was unobjectionable. (*Holbrook* v. *U. C. R. R.*, 12 N. Y., 236, 242; *Curtis* v. *Roch. etc. R. R. Co.*, 18 N. Y., 534, 540.) If error in referees' ruling, it was caused by defendants' proceeding with their proof. (*Colgrove* v. *N. Y. and H. R. R. Co.*, 6 Duer., 382; S. C., 20 N. Y., 412; *French* v. *B. N. Y. and E. R. R.*, 4 Keyes, 108, 116.) Under bills of lading

defendants were liable for want of ordinary care. (*Alexander* v. *Greene*, 7 Hill, 533; *Wells* v. *Steam Nav. Co.*, 4 Seld., 375; *Smith* v. *N. Y. C. R. R.*, 29 Barb., 132; *N. J. Steam Nav. Co.* v. *Merchants' Bank*, 6 How., N. S., 344; *Hooper* v. *Wells*, 5 Am. Law Reg. U. S., 16.) Failure to receive cotton in reasonable time, does not affect the liability of defendants. (*Clendaning* v. *Tuckerman*, 17 Barb., 184; *Gould* v. *Chapin*, 20 N. Y., 259.) What was reasonable time is a question solely for jury. (Edwards on Bailment, 521, 522; *Hill* v. *Humphrey*, 5 Watts & Serg., 123; *McDonald* v. *W. R. R. Co.*, 37 N. Y., 497, 507; *Price* v. *Powell*, 3 Com., 122; *Clendaning* v. *Tuckerman*, 17 Barb., 184; *Barcley* v. *Clyde*, 2 E. D. Smith, 95.)

GROVER, J. Concurring in the following conclusions arrived at in the opinion of PECKHAM, J., I shall not add anything to his discussion of them. These conclusions are: First. That the defendant was relieved from liability as carrier for the loss of the cotton by fire, under the contract made by the shippers for its transportation, with the Illinois Central Railroad Company at Cairo. Second. That it is to be assumed, from the evidence, that Warrack, named in the bill of lading as consignee at Chicago, was the agent of the Illinois Central Company, and not the agent of the plaintiffs; that as such agent of the company, he had power to enter into a contract with the Union Transportation Company, for the transportation of the cotton from Chicago to New York, and to provide in such contract, for the exemption of all the subsequent carriers from liability for loss happening by fire, for the reason that the Illinois Central had the power to contract for the transportation of the cotton upon such terms, by virtue of its contract with the shippers at Cairo, but had no power to bind the plaintiffs by any stipulation not embraced in that contract; and that consequently, the plaintiffs were not bound by the stipulation in the contract made by him with the Union Company, that in case of loss, the latter should be liable only for the value of the property at the time of shipment. Third.

That the exemption of liability from loss happening from fire, did not exonerate the company from liability for loss so happening, in case the fire causing it, resulted from the negligence of the defendant or its employes; that none of the exceptions of the defendant to that portion of the charge, relating to the reasonableness of the time for the removal of the cotton, after it was landed by the defendant in New York were well taken. It was proved by the defendant, that the cotton in question was destroyed by fire, while in a shed upon the dock of the defendant, where it had been placed by the defendant. The question was made upon the trial, whether this proof, of itself, constituted a defence to the action, or whether the defendant was bound to go further, and show that it and its employes were free from all negligence in the origin and progress of the fire, or whether it was incumbent upon the plaintiffs, to maintain the action, to prove that the fire causing the loss resulted from such negligence, in other words, whether the plaintiff was bound to prove that the fire causing the loss, resulted from the negligence of the defendant, or the latter was, in the first instance, bound to prove itself free from all negligence in that respect. In considering this question, it must be borne in mind, that it has already been determined, that the defendant was exonerated from all liability as carrier, for a loss caused by the destruction of the cotton by fire, by an express provision of the contract in pursuance of which it transported the cotton. Relieved of this responsibility, it was liable only, in case it was so destroyed, as bailee for hire; and it is undisputed, that such a bailee is liable for the loss of the property only in cases where the loss is the result of his negligence. The question is, whether in case of loss by a bailee for hire, the bailor can recover upon simple proof of loss, unless the bailee shall prove that he was free from all negligence contributing to such loss, or whether the bailor must go further, and prove that the loss was caused by the negligence of the bailee. I believe this to be a fair statement of the question between the parties to the present action; and yet so stated, no one will hardly insist, that the bailor can recover without affirmatively

proving, that the loss was caused by the negligence of the bailee. The decisions are numerous to this effect, based upon the familiar principle that negligence, being a wrong, will not be presumed, but must be proved by the party charging it and seeking a recovery founded thereon. I shall cite a few only. (*R. R. Co.* v. *Reeves*, 10 Wall., 176; *N. J. Steam Nav. Co.* v. *The Merchants' Bank*, 6 How. U. S., 344; *Newton* v. *Pope*, 1 Cow., 109; *Schmidt* v. *Blood*, 9 Wend., 268; *French* v. *The Buff., etc., R. R.*, decided by the Court of Appeals, 4 Keyes, 108.) Some of these were cases of loss by carriers, proved to have been from causes for which they were not liable as carriers; others where the loss was by other bailees. To these might be added other cases in the Supreme Court of the United States, in the courts of this and other States, and in England; but it is unnecessary. Cases may occur, where the proof of the loss and circumstances connected therewith, may show a case of presumptive negligence in the defendant, such as will entitle the plaintiff to recover upon that ground, in the absence of further proof. To illustrate: A passenger upon a railroad, receiving an injury caused by the cars running off the track, may rely upon the fact that they did run off as evidence of negligence; nevertheless, the *onus* is upon him of establishing to the satisfaction of the jury, that his injury was caused by the negligence of the defendant; and, unless he satisfies the jury, affirmatively, of this fact from all the evidence, he is not entitled to recover. (*Curtis* v. *The Rochester etc. Railroad*, 18 N. Y., 534.) It sometimes occurs, in the progress of a trial, that a party holding the affirmative of the issue, and consequently bound to prove it, introduces evidence, which uncontradicted, proves the fact alleged by him. It has, in such cases, frequently been said, that the burden of proof was changed to the other side; but it was never intended thereby that the party bound to prove the fact was relieved from this; and that the other party, to entitle him to a verdict, was required to satisfy the jury that the fact was not as alleged by his adversary. In such cases, the party holding the affirmative is still bound to satisfy the jury,

affirmatively, of the truth of the fact alleged by him, or he is not entitled to a verdict. In the present case, to entitle the plaintiff to recover, he was bound to prove that the fire which consumed the cotton resulted from the negligence of the defendant. The remaining inquiry is, whether the rule requiring this was violated upon the trial, from which the defendant might have been prejudiced, after proof had been given by the defendant showing the destruction of the cotton by fire. Its counsel proposed to rest his case, reserving the right to rebut any testimony that might be adduced by the plaintiffs, tending to show that the destruction of the cotton by fire was occasioned through the defendants' negligence or default. The plaintiffs' counsel insisted, that the defendant was bound to prove that it had not been guilty of negligence, and that the defendants' case must then be exhausted. The court thereupon decided, that the burden of proof was on the defendant, to show that the destruction of the cotton by fire was not caused by negligence on its part. This was error. Although in proving the destruction of the cotton by fire, it appeared that the fire originated on a boat of the defendant laying at its dock. This was only evidence tending to show negligence of the defendant. Whether sufficient *prima facie* to entitle the plaintiff to a verdict, is a question not necessary to decide, as no ruling thereon was made by the court. Be that as it may, the burden was still upon the plaintiffs to establish, to the satisfaction of the jury from all the evidence, that the fire was the result of the negligence of the defendant. Other evidence was given making the question of the defendants' negligence, in respect to the fire, proper to be decided by the jury. The court, among other things, charged the jury, that, although the defendant had been freed from their ordinary measure of responsibility as insurers, they are not relieved from the burden of satisfying you that this loss, which it is beyond doubt happened by fire, was not occasioned by negligence on its part. To this the defendants' counsel excepted. In another part of the charge the judge stated, that the real importance of the question as to reasonable time

(for the removal of the cotton by plaintiffs' meaning), consists in this case of the fact, that down to this point of time, the burden of establishing that there was not any such negligence as I have stated rests upon the defendant. This part of the charge was excepted to. Both exceptions were well taken. The idea plainly conveyed to the jury was, that they should find for the plaintiff, unless satisfied from the evidence, that the fire was not the result of the defendants' negligence, thus leaving them to find for the plaintiff, if unable to determine whether the fire so resulted or not, while the instruction should have been, to find for the defendant, unless they found, from all the evidence, that the fire was the result of the negligence of the defendant. The jury, after retiring to deliberate on their verdict, returned into court and made the following inquiry: Whether, if satisfied that proper precaution was not taken to prevent fire on board (the boat meaning), through the neglect to place a watchman there, they were to find for the plaintiff for the whole amount. To which the court responded, that the omission to place a watchman actually on the boat, specially charged with the duty of guarding her, might be considered by the jury on the question of negligence in the case; and if the jury found the defendants guilty of negligence, which contributed to the loss of all or any part of the cotton, etc., to find for the plaintiff for such cotton. This did not cure the error committed in the charge previously given and excepted to. In that, the judge had instructed the jury to find for the plaintiffs, unless the defendant had satisfied them, that the fire was not the result of its negligence. This was not withdrawn by the answer given to the question of the jury. Taking both together, the jury must have understood, that they were to find for the plaintiffs, if satisfied that the fire resulted from the defendant's negligence, and that they were also to find for them, unless they found it did not so result. This gave the plaintiffs the verdict, if the jury were unable to find negligence in the defendant, on the ground that they were unable to say that the proof showed that it was not negligent. Thus in effect, finding for the plaintiffs, without

determining the question at all, much less without finding that the fire was the result of defendant's negligence. For the error of the charge upon this point, and in the ruling upon the trial, that the burden was upon the defendant, to show that the fire did not result from its negligence, the judgment must be reversed and a new trial ordered; costs to abide event.

PECKHAM, J. (dissenting). Was the contract of the Illinois Central Railroad Company, at Cairo, where the cotton was shipped, a through contract to New York, or only a contract to carry to Chicago, the terminus of its road?

It will be observed, that there is no express contract to carry to New York. The cotton is consigned to the Illinois Central's agent at Chicago. But it is also marked, in the bill of lading, and consigned "to Sawyer, Wallace & Co., New York, account J. L. Lamb & Co.," the plaintiffs; "through rate, two dollars per 100 pounds." After stating certain exemptions to that company from liability for damage, this receipt or bill of lading says: "And it is further especially understood, that, for all loss and damage occurring in the transit of said packages, the legal remedy shall be against the particular carrier or forwarder only, in whose custody the said packages may actually be at the time of the happening thereof, it being understood that the said Illinois Central Railroad Company assumes no other responsibility for their safety or safe carriage than may be incurred on its own road."

The rate marks on the bill of lading impose no obligation, in this State, to carry further than the first carrier's hire. (*Van Santvoord* v. *St. John*, 6 Hill, 157.) Nor does fixing the value of through freight necessarily have the effect of making it a through contract.

In *Camden and Amboy Railroad Company* v. *Forsythe* (61 Penn., 81), it was held, that there was no through contract, although the first road, in its bill of lading, fixed the through rate, payable at the point of destination, but stated it would not be responsible, beyond its line, as common carrier. (*Collins* v. *Bristol and Exeter Railway*, 38 Eng. L. & Eq., 593.)

Its reversal in the house of lords proceeds upon a ground that does not impair its reasoning as to the facts of this case. (7 Ho. Lords Cases, 194; and see *Converse* v. *Norwich and N. Y. Tr. Co.*, 33 Conn., 166; *McMillan* v. *M. S. and N. I. R. R. Co.*, 16 Mich., 79.) The facts there, as finally developed in the house of lords, warranted the conclusion, in the judgment of that court, that payment for the whole transportation was received by the first road, the Great Western, for its own use, and that that road, in fact, carried the freight the whole way to its ultimate destination, in its own van and under its own guard.

In the case at bar, the Illinois road received pay only for the transportation over its own road, received its proportion of the through rate, and carried the freight only to Chicago, the end of its road.

But it contracted for the amount of freight which the shippers should pay for the entire carriage. It virtually guaranteed that this freight should be carried to New York at two dollars the hundred.

There is certainly then, very controlling reasons for its stipulating as to the risks to which its transportation should be liable.

In this view the words, "not liable for loss by fire," written across the face of the bill, should be interpreted. There is nothing in the language to limit the effect of these words to the Illinois road, and clearly, there is nothing in the reason of the thing.

Again, these words were in writing. There is a statement in the body, in print, exempting the Illinois Central from liability for fire. If they differed, the writing must prevail. Force must be given to both, if possible. This does give life to both. In *Camden and Amboy Railroad* v. *Forsythe* (*supra*), the court held, that exemption as to fire was confined to the first road, under the language there used.

The bill of lading expressly provides, for limiting the remedy for damages to the property, to the particular carrier on whose road the injury may occur.

I see no objection to allowing the contract to have its natural and ordinary meaning and obligation.

The Illinois road virtually says, "I am a common carrier to Chicago. I will carry this cotton to that point, and forward it thereafter, and as you agree that there shall be no liability for fire, I guarantee that the through transportation shall be at the rate of two dollars for 100 pounds."

If not a through contract so as to hold the first road for its safe transportation to the ultimate point, it may yet be a valid agreement as to the rate, and as to this exemption from liability.

There may be an understanding between the connecting road, without any joint interest or copartnership as to the rate and conditions upon which freight will be forwarded from each other, each being liable for its own defaults, and the first carrier may be the agent of the others.

Had the Illinois Central made a through contract to transport this property to New York, I know of no legal principle that would prohibit its contracting with any other road, to transport or forward it upon such terms and qualifications as to common-law liability as it thought fit to make.

If it made no special contract with another road, yet such other road, as to these plaintiffs, might avail itself of the protecting provisions of the first contract, as to through transport. (See *Bristol and Ex. Railway* v. *Collins*, 7 Ho. Lds. Cas., 194, per Lord Ch. CHELMSFORD.)

I think the Illinois Central made no through contract, so as to authorize it to make any special contract different from its own with another carrier. If it did not, what authority would it have to qualify or limit the common-law liability of any subsequent carrier by a special contract with such carrier? I can see none. (See *Bristol and Ex. Railway* v. *Collins*, 7 Ho. Lords, *supra*.) It was not the agent of the owner, to make any special contract with the next carrier, except that it should "not be liable for loss by fire," as that was the contract already made for its through carriage by whomsoever carried.

If the first carrier have general authority as agent of the owner, what prevents its exempting the next one from all liability, even from the fraud of its agents or servants? Where is the limit? Such a contract may be made by the owner. (*Wells* v. *N. Y. C. R. R. Co.*, 24 N. Y., 181; *Bissell* v. *N. Y. C. R. R. Co.*, 25 N. Y., 442.) Where is the limit of the agency of the first carrier, if he be an agent of the owner, to make any special contract upon that subject. His simple duty is to deliver the property to the next carrier to be forwarded.

This reasoning, if correct, renders it unnecessary to look at the terms of the bill of lading of the Union Transportation Company, given to the agent of the Illinois Central at Chicago.

The question as to the *onus* of proving negligence in the defendant in the loss of the cotton by fire, was not practically in this case at the trial.

After the defendant had given proof of the loss of the cotton by fire, and some evidence of the care used against fires, the defendant proposed to rest, reserving the right to rebut any proof of negligence offered by plaintiff.

The plaintiffs insisted that defendant must exhaust its proof on that subject as the *onus* lay on it to prove proper care.

The court so ruled. The plaintiff having proved a *prima facie* case of negligence in defendant's failure to deliver the cotton, clearly defendant was then bound to exhaust its proof on that question. Defendant had no right to prove one fact and rest, and then return to like proof again. (This will be again referred to.) The defendant proceeded and gave it's proof in full. The plaintiff then gave some testimony on the point.

The court then charged the jury, that though the defendant was not an insurer, "yet it was not relieved from the burden of satisfying you, that this loss was not occasioned by negligence on its part; and if it omitted to take that degree of care, which persons of ordinary prudence would usually take under such circumstances, and that caused" the loss, the defendant would be liable.

The judge then in several ways repeated, that if the defendant had not exercised the proper care, and that caused the loss, it was liable. The judge said the jury must decide that, from the evidence, from the facts and circumstances proved and relied upon in the case, concluding on this point, "if you conclude from your review of the proof, that the defendant was guilty of negligence contributing to the injury," then the jury should find for the plaintiff.

It was submitted to the jury, to find upon the evidence given (not upon any presumption for lack of proof), as to the exercise of proper care.

There was no charge, as to what the jury should do in case they were in doubt upon the evidence, or if the testimony was balanced as to negligence, but simply to find upon the facts proved.

The plaintiff gave very little testimony as to negligence, and there was little, if any, material contradictory evidence.

Upon confessedly proved facts the jury found the negligence.

The question as to the *onus probandi*, therefore, is simply hypothetical. The facts were fully proved, no matter by whom, and those facts were properly submitted to the jury to decide.

No legal injustice could thus have been suffered by defendant. In such case no new trial should be granted.

But assume that the question properly arose; then upon whom rests, the *onus* of proving the exercise or the want of ordinary care by the carrier.

The plaintiff proves the delivery of the goods and the failure to deliver by the carrier, or a demand, and refusal, and rests. The defendant must then make out a defence.

It proves that the goods were destroyed by fire while in defendant's custody, and that the company is exempt from loss by fire.

Does that make a *prima facie* defence? I think not.

Here let it be observed is an ordinary fire; it is not a loss by the act of God. A loss by such a fire never is. (*Miller*

v. *Steam Nav. Co.*, 10 N. Y., 431.) And the rule is laid down by Sir WM. JONES, and by POTHIER, that such a fire occurring on the defendants' own premises is *prima facie* evidence of negligence. (Story on Bail., § 406, 411.) Such a presumption is founded upon human experience.

In speaking of mere proof of burglary by an innkeeper, Ch. J. REDFIELD observed, such proof is not sufficient, inasmuch as the majority of such burglaries may be supposed fairly to result from negligence on the part of the innkeeper. (*McDaniel* v. *Robinson*, 26 Verm. at 340; and see *C. & A. R. R. Co.* v. *Baldauf*, 16 Penn, 67; so in *West Trans. Co.* v. *Downer*, 11 Wall., 129.) The court concedes, that if such loss generally does not occur without negligence, then mere proof of the fire makes no defence, without proving the proper care exercised by the defendant.

I think it may be safely said that a majority of fires are caused by negligence, so safely as to base a presumption of law thereon. That being so, it follows that merely showing that a fire occurred upon defendants' own premises, originated there and consumed the cotton intrusted to its charge, and in its custody for hire, makes no defence without adding the proof of the exercise of proper care. When a car runs off the track (*Carpue* v. *Lon. and B. R. R. Co.*, 5 Ad. & Ell., 747); when a stage-coach oversets (*Stokes* v. *Saltonstall*, 13 Peters, 181); or a wheel of a coach runs off (*Ware* v. *Gay*, 11 Pick., 106), and a passenger is injured, it was held, that the nature of the accident afforded proof of the defendant's negligence, and he was called upon to give proof of care.

So in this court, it was properly held by GROVER, J., that where an injury to a passenger was caused by the cars running off the track, the negligence was, *prima facie*, proved by proof of the running off, and the injury consequent. His remarks are so pertinent that I quote: "The plaintiff has sustained his cause of action, when he has shown a failure to perform the duty from which he has sustained an injury. It is for the defendant, then, to show the facts relieving him from responsibility in the particular case. This imposes no hard-

ship upon the defendant in this class of cases. The whole management is exclusively under his control. He has ample means to show the true cause of the difficulty. The plaintiff knows nothing about it. He takes passage with the carrier, who instead of conveying him safely, inflicts an injury upon him by the failure of some of the machinery employed by him. In many cases it would be impossible for the plaintiff to ascertain the particular defect, and I think, no such obligation is cast upon him by the rules of evidence." (*Curtis* v. *Roch. and Syr. R. R. Co.*, 18 N. Y., 543.)

So, in the Exchequer Chamber, it was held, that where the thing is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen, if those who have the management use proper care, it affords reasonable evidence that the accident arose from want of care. (*Scott* v. *Lond. Dock Co.*, 3 Hurlst. & Colt., 596.)

It is said that the plaintiff has averred negligence, and must prove it.

He has averred a failure to deliver the cotton by reason of negligence and want of care.

This he fully proves by proving the failure to deliver. A failure to deliver is *prima facie* evidence of negligence in the carrier; an omission or neglect to discharge the duty he has assumed.

This is negligence. This was conceded by defendant at the trial, as he made no motion for a nonsuit, but proceeded with his proof.

A defence is not made to this *prima facie* case of negligence, by simply proving that the property was consumed by an ordinary fire, which broke out on the defendant's own premises.

If it were a destruction by lightning, the case might, perhaps, be different. Then human care or effort would be generally, out of the case, to avoid the lightning or the extraordinary floods. Though, even there, it is said, the carrier must show the exercise of proper care. (*Read* v. *Spaulding*,

30 N. Y., 630; Story on Bail., § 470; Ang. on Common Car., § 266; *contra*, *Charleston R. R.* v. *Reeves*, 10 Wall., 176.)

But, as to an ordinary fire on one's own premises, some neglect is, as a general rule, the cause of it.

Instead of being an answer to the *prima facie* case of negligence, such a single fact would afford additional evidence of a want of care, or of negligence.

The carrier must show a defence. He must show, what it is easy to do, if the truth will allow, that he has done his duty to prevent the fire, that he has exercised ordinary care, in vain. Then his defence is complete, and not till then.

Common justice and public policy alike demand this rule. With what propriety can a plaintiff be called upon to prove facts known only to the defendant or his employes; to call defendant's witnesses?

The authorities on this subject are conflicting, and it is impossible to reconcile them. I do not propose to attempt it. (*McDaniels* v. *Robinson*, 26 Verm., 316; *Turney* v. *Wilson*, 7, Yerger, 340; *Whiteside* v. *Russell*, 8 Watts & S., 44; *Swindler* v. *Hilliard*, 2 Richardson, 2486; *Roberts* v. *Riley*, 15 La. An. R., 103; *Beardslee* v. *Richardson*, 11 Wend., 26, per SAVAGE, Ch. J.; *Parsons* v. *Monteath*, 13 Barb., 353, per WELLS, J.; *Per contra*, id., 48, per C. L. ALLEN, J.; *Mann* v. *Birchard*, 40 Verm., 326–338; *Lichtenhein* v. *B. and P. R. R.*, 11 Cush., 70; *Arent* v. *Squire*, 1 Daly, 347; *Christie* v. *Griggs*, 2 Camp., 79; *Platt* v. *Hibbard*, 7 Cow., 497. *Per contra: N. J. St. Nav. Co.* v. *Mer. Bank*, 6 How. U. S., 344; *Schmidt* v. *Blood*, 9 Wend., 268, and cases there cited; *Fort* v. *Storrs*, 2 Barb., 326; 3 id., 380; *Memphis and Charleston R. R.* v. *Reeves*, 10 Wall., 176; *West. Tr. Co.* v. *Downer*, 11 id., 129; *Bingham* v. *Rodgers*, W. & S., 495; *F. and M. Bank* v. *Champ. Tr. Co.*, 23 Verm., 186.)

This precise question, as to the burden of showing the exercise or the absence of ordinary care, where goods are consumed by a fire occurring upon the carrier's own premises, is not inconsistent with the position, that upon the plaintiff, ultimately rests, the *onus* of establishing the negligence.

That the carrier is required to show, that the care in the case above stated, rests upon two clear grounds.

First. The knowledge is exclusively with the carriers. The plaintiff ought not to be compelled to call defendants' witnesses, or to find them.

Second. Experience shows that an ordinary fire, as a general rule, does not occur without negligence.

Where the testimony is all in, as to the cause of the fire, the care exercised to prevent or to save, the *onus* may still rest with the plaintiff to establish the negligence; and if the testimony be evenly balanced, that the jury cannot determine to which side it preponderates, the plaintiff cannot recover.

The charge of the judge contained nothing at war with this proposition, and should be sustained.

It is also urged, that the contract of the Transportation Co. at Chicago, stipulated in substance, that the burden should be upon the plaintiff to show negligence.

It has been already stated that that contract was made without authority from the plaintiff; and hence, imposed no obligation, even if the parties could control the rules of law by contract.

It is urged that the court did not properly define ordinary care to the jury.

There was no exception to the definition, and it cannot here be reviewed.

Upon the question of negligence, I think there was testimony sufficient to carry the cause to the jury.

What is ordinary care depends entirely in each case upon the nature of the peril. The care must be in proportion to the peril.

As to the amount of damages it has already been held in this opinion, that the Union Transportation Company's contract has no force as against this plaintiff upon that assumption. I do not understand that the rule of damages is complained of.

The judgment should be affirmed.

For affirmance, PECKHAM and ALLEN, JJ.

For reversal and new trial, Ch. J. GROVER, FOLGER, and RAPALLO.

Judgment reversed.

K. COLLINS KELLOGG, Respondent, *v.* DANIEL SWEENEY, Appellant.

The recovery in all actions should be for what is lost, whether by breach of contract express or implied, or by a tort.

Gold coin is not merchandise, but one kind of money; and in an action of tort to recover for its loss, the judgment should be for gold, and not for its value in currency. (Ch. J., and ALLEN, J., dissenting.)

(Argued September 6, 1871; decided September 12, 1871.)

APPEAL from judgment of the General Term of the fifth judicial district, affirming judgment entered in Lewis county in favor of plaintiff, upon the report of a referee.

(Reported below in 1 Lansing, 397.)

The action is brought to recover for a quantity of gold coin, alleged to have been lost through the negligence of defendant, an innkeeper.

Defendant was the proprietor of a hotel in the city of New York, known as Sweeney's hotel, kept on the European plan. On the 9th of December, 1863, plaintiff went to said hotel as a guest, registered his name, and called for a room, but only succeeded in obtaining a bed in the parlor, where there were a number of temporary beds and other persons sleeping. Plaintiff had a satchel containing gold coin to the amount of $493.51. This he gave to the clerk, telling him it contained valuables, and receiving a check for the same. In the morning he called for his satchel; search was made, but it could not be found. One of the employes of the house finally brought it from the upper part of the house, saying it was found on the roof of an adjoining building. It was found opened and the gold coin abstracted. The notice required by the statute was not posted on the door or in the room where plaintiff slept. The referee found, that some of defendant's employes rifled the satchel of the gold. On the 10th December the value of gold coin in currency was 1.59. The referee gave judgment for the currency value, with interest.

J. H. Reynolds, for appellant. Defendant was not an innkeeper, and not bound to care for the goods of his lodger.

(*Doe ex dem. Pitt* v. *Launcey*, 4 Campb., 76; *Carpenter* v. *Taylor*, 1 Hilt., 195; *Thompson* v. *Lacy*, 3 B. & A., 287; *Holder* v. *Soulby*, 8 C. B., N. S., 254; 5 Bell's Com., 7th ed., 498 and notes; *Schmidt et al.* v. *Blood*, 9 Wend., 268.) Plaintiff guilty of contributory negligence, and defendant not liable. (*Bendetson* v. *French*, 44 Barb., 31; *Fowler* v. *Dorlon*, 24 id., 384; *Armistead* v. *Wilde*, 17 Q. B., 261; Redfield on Con., 271.) Defendant provided a safe and gave notice, and is exempt. (Chap. 421, Laws 1855; *Hyatt* v. *Taylor*, 3 Hand, 258; *Purvis* v. *Coleman*, 21 N. Y., 111.) Defendant not liable for the money lost. (*Merrill* v. *Grinnell*, 31 N. Y., 210; *Hallenback* v. *Fish*, 8 Wend., 547; *Grinnell* v. *Cook*, 3 Hill, 489; *Ingallsbee* v. *Wood*, 33 N. Y., 79.) The property being money, the nominal amount only recoverable. (Edw. on Bailments, 61–65, 102, 103; 19 N. Y., 34.)

J. D. Kernan, for respondent. Defendant is an innkeeper. (Bac. Abr., title Inns, sub. B; Story on Bailments, 5th ed., § 475; *Thompson* v. *Lacy*, 3 B. & A., 283; 2 Kent's Com., 5th ed., 778, 779; *Willard* v. *Reinhardt*, 2 E. D. Smith, 148; *Wintermente* v. *Clark*, 5 Sandf., 242; *Taylor* v. *Monnot*, 4 Duer, 116; *Bendetson* v. *French*, 44 Barb., 31; *Krohn* v. *Sweeny*, 2 Daly, 202.) Defendant liable for the gold coin lost. (*Grinnell* v. *Cook*, 3 Hill, 485, 488; *Hulet* v. *Swift*, 33 N. Y., 571; *Piper* v. *Manny*, 21 Wend., 282; *Clute* v. *Wigyins*, 14 Johns., 174; 1 Bl. Com., 430; 2 Kent, 592, 593; Story's Com.; 2 Kent, 470, 471, 479; Story on Bailments, §§ 470, 481; *Wilkins* v. *Earle*, Com. of Appeals, January, 1871; *Kent* v. *Shuckard*, 2 B. & A., 803; *Needles* v. *Howard*, 1 E. D. Smith, 54; *Taylor* v. *Monnot*, 4 Duer, 116; *Stanton* v. *Leland*, 4 E. D. Smith, 88, 93; *Fowler* v. *Dorlon*, 24 Barb., 389; *McDonald* v. *Edgerton*, 5 id., 560; *Van Wyck* v. *Howard*, 12 How., 147; *Purvis* v. *Colman*, 21 N. Y., 112, 116; 1 Smith's Leading Cases, 309; *Buinton* v. *Courtney*, Hayw. N. C., 41.) Not exempt under chapter 421, Laws of 1855. (*Purvis* v. *Stetson*, 21 N. Y., 111; *Hollister* v. *Knowlton*, 19 Wend., 234.) Plaintiff not guilty of negligence. (*Keegan* v.

W. R. R. Co., 8 N. Y., 175; *Fowler* v. *Dorlon*, 24 Barb., 384; *Piper* v. *Manny*, 21 Wend., 282; *Hulet* v. *Swift*, 33 N. Y., 571; *Gile* v. *Libby*, 36 Barb., 70.) The rule of damages is the value at time of loss. (*Needles* v. *Howard*, 1 E. D. Smith, 54; *Richmond* v. *Bronson*, 5 Denio, 55.) Defendant entitled to value of gold in currency. (*Bank of C.* v. *Van Vleck*, 49 Barb., 508; *Taylor* v. *Ketchum*, 5 Robt., 507; *Lubing* v. *At. M. I. Co.*, 50 Barb., 521.)

By the Court—PECKHAM, J. *Bendetson* v. *French*, decided at the present term of this court, covers all the material questions in this case, except the point as to the amount of the recovery. The plaintiff recovered at the trial for the amount of gold coin lost: $493.50, premium, 59 per cent, $291.16 and interest on both.

When this coin was lost, there were two currencies in the United States established by law as the court has held.

The plaintiff lost gold coin. Why should he recover in paper currency? Why should not this case be decided precisely as if the legal tender act, so called, had never been enacted by congress?

I can see no reason for calling this gold coin merchandise; and therefore, a recovery should be had for its value in currency. It is clearly one kind of money; and there is no reason for recovering for its loss in any other kind of money. It cannot be said that the value of gold coin changes more than the other kind of currency, which an act of congress has declared to be money. The truth is the other way. The fluctuation is in the congressional paper currency; not in the gold coin. True, paper is now worth nearly fifty per cent more than it was in 1863 when this money was lost. It might easily have been worth much less. The gold coin is worth substantially the same.

We have recently held, that a bill of exchange, payable here in gold dollars, drawn since the passage of the legal tender act is recoverable in gold, and that the judgment should be for gold dollars. (*Chrysler* v. *Renois*, 4 Hand,

209.) Legal justice is done by a similar judgment in this case.

The court cannot regard the fact, that this coin will purchase much less paper currency now than it would in 1863. If it would purchase much more, the rule would be the same.

There is no reason for varying the judgment in this case, because the action is for what the law terms a tort. There is not the least distinction in principle. In *Chrysler* v. *Renois* there was a breach of an express contract payable in gold dollars.

Here, in reality, is a breach of an implied contract, on the part of the innkeeper, to keep the goods of his guest safely.

If it were a plain tort, accompanied with force, the principle is the same.

The recovery should be for what is lost, whether by breach of an implied or an express contract, or by a tort.

No sound distinction can be made in the cases. Hence, none is made in the judgment.

I have examined the other points raised at the trial, and do not think the court committed any error in their disposition.

The judgment is modified so as to make the recovery for the amount of the gold coin lost, with interest thereon to the time of entry of the judgment below, payable in coin, with costs of the court below, payable in currency, without costs of appeal to either party.

Of course the plaintiff is entitled to interest on his judgment, except as to costs payable in coin.

ALLEN, J. (dissenting). It is agreed by all the members of the court, that the plaintiff was entitled to recover in the action, and that no error appears in the record entitling the defendant to a reversal of the judgment.

A modification of the judgment by which the plaintiff will recover, in coin, the same number of dollars lost, instead of the market value thereof on the day of the loss is suggested,

although no such question was made by the counsel for the appellant. An anomalous condition exists in the United States, resulting from the fact, that by act of congress there are two distinct currencies of different values made a legal tender in the payment of debts and obligations, payable in money generally, are solvable in either at the option of the debtor. The consequence is, that for all practical purposes in the internal traffic of the country, the inferior currency has become the standard of value, and by it the prices or value of breadstuff and merchandise are measured, and gold, which is the recognized standard of exchange in our dealings with other countries, has in fact, and in spite of all theories, and all the maxims of political economists, became an article of commerce, and is bought and sold daily in the market. While it may be said that the value of gold is permanent, and the price of greenbacks has fluctuated, this is but a form of speech, and conveys no practical idea under present circumstances. The latter are not the subjects of purchase and sale; but gold is sold at prices payable in greenbacks, and fluctuating as demand and supply vary, or other circumstances affect the market. Gold ceased to be the sole standard of value, when another and inferior currency was made by law an equivalent in the discharge of ordinary pecuniary obligations; and from that time contracts not made in terms, payable in coin, could legally be, and were, in fact, discharged by payment in the inferior currency. The law recognized the right of parties to contract for the better currency, and courts have given effect to such contracts by giving special judgments in actions brought upon them. The intent of the parties has, by a necessary change in the forms of procedure and judgment, been carried out. (*Chrysler* v. *Renois*, 43 N. Y., 209.) It does not follow that the rules which have been adopted, to give effect to contracts made in reference to the anomalous condition of the laws of the United States, regulating and prescribing the character of legal tender, are applicable in actions of tort. In actions for wrongs, the plaintiff demands compensation in money for

damages sustained, and in the ordinary or usual currency of the country; and it is not like the case of a contract, which the parties have made the law of the particular transaction, and have declared in which of two recognized currencies the contract shall be performed; and the courts simply import into the judgment the terms of the contract, by making it payable in that currency, which is a lawful tender and has been agreed upon by the parties. If a party loses bullion by the wrongful act of another, the rule and measure of damages in an action, is the same as for the loss of a horse, or a bushel of wheat, viz.: The value of the article at the time of the loss with interest, and the value is necessarily, as it is practically measured or estimated by the usual and ordinary standard of value; that is, its market value in the currency in ordinary use; that sum, which on the day of the loss would have replaced the property. At the time of the loss of the gold coin by the plaintiff, it had a known market value in the ordinary currency of the country; that currency recognized by the courts, and which was receivable in payment of all debts, as well by judgment as simple contract, and the plaintiff is entitled to recover as damages that sum, which at that time, would have replaced the gold coin lost, with interest on that sum. He is entitled to that which he then lost and nothing more. A return of the gold in specie may or may not indemnify him; but, be that as it may, there is no act or assent of the parties, that the judgment in this action be made an exception to the ordinary forms of judgments in other actions, or to measure the compensation to the plaintiff, by any other than the ordinary rules in such cases.

The coin lost was property daily quoted in the market, capable of valuation in the currency in general use, and which was payable in satisfaction of all judgments not special in form, and all ordinary contracts; and it will add to the complexities and difficulties growing out of the fact, that two recognized species of legal tender money exist by law, to extend the rule which, from necessity to give effect to the

intent of parties, has been applied to special contracts calling for coin.

I am for an affirmance of the judgment.

For affirmance, Ch. J. and ALLEN.

For modification of judgment in accordance with opinion of PECKHAM, J. PECKHAM, FOLGER, GROVER, and RAPALLO, JJ.

Judgment modified accordingly.

MATTHEW CLARKSON *v.* WILLIAM SKIDMORE, Ex r, etc., et al.

A lessee for years of mortgaged premises, holding under a lease containing a covenant of quiet enjoyment, upon foreclosure and sale under the mortgage, is entitled to receive, out of the surplus moneys, the value of the use of the premises for the remainder of his term, less the rents reserved and other payments to be made by him under the lease.

By being made a party to the foreclosure suit, he is not concluded as to the value of the fee, by the amount the premises brought at the sale; nor is he limited to a per centage thereon in fixing the rental value. The right granted to the lessee by the lease is an interest in the premises, capable of being sold and transferred, and has precedence of the estate of the lessor, and is an encumbrance upon the land to the extent of the lessor's interest. The lessee, having this right of priority over the lessor, is interested only, in seeing that the property produces sufficient to cover his interest. He has no interest or duty to create a fund for the benefit of the lessor; and if the premises are sold at less than their value, the loss must fall upon the latter.

As between the lessor and lessee, the estate of the latter is not subject to the claims of the mortgagee, or to any other encumbrance or claim upon the premises. They are charges upon the interest of the lessor only, who is bound to protect the estate of the lessee therefrom.

The effect of the sale is to substitute the proceeds, as far as they will go, for the several interests in the premises sold, and such interests are to be satisfied out of the proceeds in their order of priority. Equity will not permit one claimant of the fund, who has covenanted to protect the title of another, to increase his own share of the fund, by compelling the other to contribute to the discharge of prior encumbrances.

Where the parties claimant are before the court, and the contest is between them only, or those claiming under them, the court has power to make a

Statement of case.

final disposition of the fund, in accordance with the covenants existing between them and the equities resulting therefrom.

Upon an appeal to the General Term from an order confirming the report of a referee, giving the entire surplus moneys to the executor of the lessor, the court set aside the report and referred the case back, and in the order directed, that the share of the lessee should be ascertained, by computing the value of the residue of his term in the surplus, deducting therefrom the amount of the payments to be made by him under the lease. Upon the second hearing, evidence was received, under objection on the part of the executors, as to the annual rental value of the premises. The executors, relying upon the decision of the General Term, offered no evidence thereon. — *Held*, that the executors had a right to repose upon their objections, as the case then stood, and the matter should be referred back, to give them an opportunity of adducing evidence upon the question of the value of the term.

(Argued June 21, 1871; decided September 11, 1871.)

APPEAL from order of the General Term of the Supreme Court, first department, affirming an order of Special Term, which denied a motion to confirm the report of a referee, as to the disposition of surplus moneys arising upon a foreclosure sale, and made other disposition thereof.

B. F. Randolph, the owner of the premises, executed to Lewis W. Phillips and Frederick C. Oakley on the 8th day of March, 1855, a lease thereof for ten years, expiring May 1st, 1865, and containing the usual full covenants, and also a covenant by said Randolph for himself, his heirs, executors, etc., to pay for the buildings erected by said Phillips and Oakley on the said premises; which lease and all his interest therein said Oakley assigned to said Phillips.

Said Randolph executed to the plaintiff a mortgage of $25,000, recorded October 6th, 1864; he is dead, and the executors, the claimants, are his executors.

The wife of Randolph joined in the mortgage.

Randolph, on the 1st day of April, 1865, executed to Lewis W. Phillips a lease of the mortgaged premises for ten years, expiring May 1st, 1875; recorded October 13th, 1865, and containing a covenant of quiet enjoyment.

Phillips executed to William Remsen, a mortgage on his

said leasehold interest for $15,000, dated December 30th, 1867, and recorded December 31st, 1867. The interest on this has been paid up to April 1st, 1869. The principal and interest from that day are due and unpaid.

Phillips subsequently executed to Jesse Hoyt, assignee, another mortgage on his said leasehold interest for $5,000, dated October 3d, 1868, and recorded October 8th, 1868. There is now due on this mortgage the sum of $3,910$\frac{41}{100}$, and interest on $3,750 from April 3d, 1869.

The mortgage to the plaintiff was foreclosed. The usual decree of foreclosure and sale was made on the 3d day of March, 1869. The premises were sold on the 1st day of April, 1869; and the referee's deed to the purchaser was executed and delivered on the 3d day of May, 1869, and possession demanded by and delivered to the purchaser on the 3d day of May, 1869, by Phillips, who, until then, had been in possession of the premises, under his lease, from its date up to that day. Phillips, the lessee, and Remsen, his mortgagee, were both made parties in the foreclosure suit. The other parties defendant being the representatives of Randolph the mortgagor.

The premises produced at the mortgage sale the sum of $119,750; and the surplus, after paying the plaintiff's mortgage and all the expenses and the unpaid taxes on the premises, was $85,046.91, which was paid into court.

The quarter's rent due from Phillips on the 1st of May, 1869, was not paid. The taxes for two years are unpaid, and are deducted from the amount produced at the sale.

The value of the widow's dower was found to be $20,615.28, which is admitted to be the first claim on the surplus; thus leaving the balance of the surplus $64,431.63.

The claimants before the referee for the balance of the surplus, viz., $64,431.63 were the lessee Phillips and his mortgagees, Remsen and Hoyt, on the one side, and Randolph, the lessor (or his representatives), on the other.

The referee, by report dated September 13th, 1869, reported that the executors of Randolph were entitled to *the whole*

surplus, and that neither Phillips nor Remsen were entitled to any part thereof.

Phillips, Remsen, and Hoyt excepted to this report. The Special Term overruled the exceptions *pro forma*, and an appeal was taken to the General Term of the Supreme Court.

The Supreme Court at a General Term reversed the order of the Special Term, and allowed the exceptions of the defendants, Phillips, Remsen, and Hoyt, and referred it back to the referee to find the value of their claims, with directions to take the amount the premises brought at the foreclosure sale as the value of the fee; and upon that basis, estimate the value of the unexpired term, without resorting to the opinions of witnesses upon that question. (This decision is reported in 2 Lansing, 238.)

Upon the second hearing before the referee, witnesses on behalf of Phillips testified as to the value of the unexpired term. This testimony was objected to by the counsel for Skidmore.

The referee found the value of Phillips interest for the remainder of the unexpired term of his lease, subject to the claims of Remsen and Hoyt, and certain rent and taxes due Skidmore as executor, to be $42,221.29.

That the claimant Phillips, by reason of his lease, and Remsen and Hoyt, by reason of the mortgages to them, have liens on the said surplus moneys, and have priority over every other lien, and that payment of the aforesaid value of Phillips' interest should be made to him, after payment therefrom of the rent and taxes then due said Skidmore as executor, and after payment of the claims of Remsen and Hoyt; and that the claimant, Skidmore, was entitled to the balance of the surplus moneys. The Special Term refused to confirm the report, but granted an order finding the value of Phillips' interest, by taking the amount the premises brought on foreclosure sale, and calculating, six per cent per annum thereon, deducting the annual rent and taxes agreed to be paid by the lease.

W. Fullerton and S. Hand, for S. W. Phillips, lessee, and for W. Remsen and Jesse Hoyt, mortgagees of lessees. The lessee had an estate in the lands. (1 R. S., Edward's ed., 714, § 36; *Burr* v. *Bryan*, Court of Appeals; *Averill* v. *Taylor*, 4 Seld., 42.) His interest in the surplus is the value of his unexpired term. (*Mack* v. *Patchin*, 42 N. Y., 167; *Chatterton* v. *Foy*, 5 Duer., 64; *Smith* v. *Taylor*, 8 N. Y., 44; *Matthewson* v. *Duryee*, 45 Barb., 69; *Denniston* v. St. P. Ch., 2 Bos. Ch., 555; *Livingston* v. *Weldnum*, 19 N. Y., 440; *Arnot* v. *Amdon*, 4 Hill, 345.)

J. M. Van Cott and *W. E. Curtis*, for William S. Skidmore, executor, etc. The foreclosure sale ended the term. As to the unexpired term, the lessee's rights rested merely in executory contract. (Bac. Ab., tit. Lease, vol. 4, p. 1 *et seq.*; 2 Bl. Com., 140; id., 386; 4 Kent's Com., 35; Austin's Lect. on Jurisp., 49th, vol. 3, p. 15; *Burr* v. *Stenton*, 52 Barb., 377.) The lease was simply a lien on the equity of redemption, and entitles lessee only to proportionate share in surplus. (*Swaine* v. *Perine*, 5 Johns. Ch., 482; *Hawley* v. *Bradford*, 9 Paige, 201; *Bank of Commerce* v. *Owens*, 31 Md., 320; *Burr* v. *Stanton*, 52 Barb., 377; S. C., in Court of Appeals, *sub nom. Burr* v. *Bryan*.) The covenant of quiet enjoyment was conditional on payment of rent; this condition having been broken, the lessor was not bound to protect the lessee's possession. (*Ireland* v. *Bircham*, 29 E. C. L. R., 266; *Coward* v. *Gregory*, L. R., 2 C. Pl., 153, 172; *Neale* v. *Ratcliffe*, 69 E. C. L. R., 916.)

RAPALLO, J. The surplus moneys in controversy belong to the parties who had estates or interests in the land sold, which were cut off by the sale. The real estate having been converted into money, the several parties were entitled to be paid, out of the fund, the equivalent of their respective interests, in the order of their priorities as between each other. After the satisfaction of the mortgage debt, which was the first lien, the claimants were, first, the widow of the mortgagor, in

respect of her right of dower; secondly, the lessee of the mortgagor, and the mortgagees claiming under such lessee; and thirdly, the executor of the mortgagor and lessor, who was entitled to the residuum, whatever it might be.

The value of the widow's right of dower has been ascertained, and no question is raised as to the amount to which she was entitled. The claims of the mortgagees of the lessee, depend upon the valuation of the interest of the lessee, and must be satisfied out of the sum to be set apart in respect of that interest, so far as it may go.

They need not, therefore, be separately considered. The controversy is thus reduced to the apportionment to be made between the lessee and the executor of the lessor, of the fund still remaining in court. That the lessee had an estate in the land, is too clear to admit of discussion. (See *Burr* v. *Bryan*, decided January, 1871; *Averill* v. *Taylor*, 4 Seld., 44.) And it is equally plain, that his claim to compensation for the value of this estate, has precedence of that of his lessor from whom the estate was derived. But the determination of the principles, upon which the value of this estate for years is to be ascertained, involves questions of considerable difficulty and importance.

The lessee, as between himself and his lessor, had a right to the possession and enjoyment of the whole of the premises, during the residue of the term of his lease, being six years, subject only to the payment of the rent reserved in the lease and of the annual taxes which he had agreed to pay. This right had been conveyed to him by the lessor with a covenant of quiet enjoyment; and he had thus become entitled to the benefit, during that term, of the increase in the value of the occupation of the premises, and to whatever difference existed between the value of the use thereof, and the annual rent and taxes agreed to be paid therefor. He had, in fact, contributed to such increase of annual value, by expenditures for improvements made by him on the premises, after the commencement of his term. To the extent of the value of the rights thus vested in the lessee, the lessor had, by giving the lease, dimin-

ished the value of his own estate. He had parted with and transferred to his lessee, the right of occupation for a term of years, and remained entitled only to the rent reserved and the reversion subject to the mortgage.

If the rent reserved in the lease was equal to, or more, than the annual value of the premises, then the estate of the lessee was manifestly worthless; but if, on the contrary, as appears to have been the fact, the annual value of the property was much greater than the rent reserved in the lease, the estate of the lessee was of importance, and a serious incumbrance on that of the lessor; and the lessee is entitled to receive its equivalent out of the surplus of the proceeds. Witnesses were introduced before the referee, to prove the amount for which the premises were let after the sale, and what was their fair rental; but the court below held that such evidence should not be resorted to, but that the sum which the premises brought at the sale, should be taken as the value of the fee and interest thereon at six per cent, as the annual value or rental. The value of the fee may be an element to be taken into consideration in determining the value of the rental; but it cannot be uniformly adopted as the only legal basis of calculation, nor can a uniform per centage upon such value be fixed upon, as a fair rental for all classes of property and under all circumstances. Unimproved lands are generally let even for long terms at a much lower rate, in proportion to the value of the fee, than buildings, which are constantly undergoing deterioration and decay. A tenant often erects improvements upon leased property at his own risk and expense, relying, and with safety, upon obtaining reimbursement by means of the increased annual value thus imparted to the property, which he will enjoy during his term. To award to him, as the equivalent of his term, simply interest upon the value of the fee of the land and improvements, would clearly do him injustice. While, on the other hand, a tenant for a short term of unimproved city lots, which, in their undeveloped condition, would command but a trifling annual rent, would, by being allowed interest on their actual value, receive much more than

he was entitled to, and the owner of the reversion would suffer.

The value of the term must depend upon the circumstances of every individual case; the length of the term and conditions of the lease, the character of the property, its location, the readiness with which it may be let, the condition of the buildings, whether substantial and durable, or requiring frequent repairs, the uniformity of rents in the neighborhood or their fluctuating character; in short, every material consideration which would enter into the mind of a purchaser of the term, in judging what would be a fair price for it, and, like other ordinary questions of value, should be determined, as a matter of fact, upon the testimony of witnesses competent to speak upon the subject.

In so far as the value of the fee may properly enter into the calculation, the amount which the premises brought at a fair sale by auction, may be competent evidence upon that point. But it cannot be said to be conclusive, even upon parties to the action in which the sale was made, except as between those parties whose interests are in common. Where one party is entitled to priority over the other, it should not be deemed conclusive. The party having such right of priority, is interested only in seeing that the property produces sufficient to cover his demand; and when that object is accomplished he may well refrain from further efforts, though the result be that the property is struck off for less than its value. The loss then falls upon those whose rights are subsequent to his. The lessee in this case was interested in seeing that the premises produced a sum sufficient, after paying all prior charges, to compensate him for the value of his lease; but he had no interest or duty to create a surplus beyond that, for the benefit of his lessor. Nor did his right, nor the value of his term, depend upon the amount the premises should bring at the sale. He should not, therefore, be concluded by it. As between the lessor and lessee, the lessee did not hold, subject to any agreement or condition, express or implied, that the land might be converted into money, or to the right of any

person so to convert it. The lessor had granted to the lessee, the right of occupation of the land for a specified term, and covenanted that he should quietly enjoy it. This right had a value capable of ascertainment. It was an interest in the land, and was capable of being sold and transferred. It had precedence of the estate of the lessor, and was an encumbrance upon the land to the extent of the lessor's interest. If the lessor had desired to sell, he would have been obliged to rebate from the price the value of that incumbrance, as well as the amount due on the mortgage. Now, when the premises were sold to satisfy the debt of the lessor, and the sale divested the title both of the lessor and lessee, there is no reason why the amount which the lessee is to receive, as the equivalent of the estate of which he has thus been divested, should depend upon the amount produced by the sale, so long as it left a surplus sufficient to compensate him for the value of his term. If the premises brought their full value, the proceeds would necessarily be sufficient to pay the value, both of the term and the reversion. But if they brought less than their value, the loss should fall on the reversioner, whose estate is subject to the lease. This view is consistent with the position, that the lessee in claiming payment out of the surplus moneys of the value of his term, is following the proceeds of his estate, and not demanding damages for the breach of the covenant of the lessor. His claim is limited to the surplus moneys. If they are insufficient, he can obtain no further redress. But to the extent of the value of his term, they must be deemed the proceeds of his term, because of its priority over the estate of the lessor. The lessor has granted an interest in the land, which can only be measured by valuation when the land is converted into money. And that interest takes precedence of his own estate. To make a good title to the purchaser at the sale, that interest must be extinguished. And for the purpose of extinguishing it, the lessee is made a party to the action, and his estate is embraced in the sale. The purchase money must be deemed to be paid, for the estates or interests sold, in the order of their

priorities, though the result be, as frequently happens, that the owner of the ultimate fee gets nothing. That result may follow from the owner having encumbered his estate to more than its value, or from the property being sacrificed at a forced sale. The case would have been different if, instead of granting an estate in the whole of the land, the owner had granted, in fee, an undivided share of the land. In that case his grantee could only claim a corresponding share of the proceeds, and the grantor would be entitled to the proceeds of the share he had retained, for they were in no wise subjected to any right of the grantee of the share sold. But here he has subjected his whole estate to the rights of the lessee; and, therefore, must be postponed until the claim of the latter is satisfied. The claim made on behalf of the executor, that the estate of the lessee was subject to the mortgage and dower right, and that, therefore, the lessee is entitled only to the difference between the rent reserved in the lease, and the interest of the surplus moneys (after deducting the mortgage debt and the value of the widow's dower), during his unexpired term, is wholly untenable. It is true, that as between the lessee and the mortgagee, and doweress, his estate was subject to their claims. But as between him and his lessor it was not. Between the lessor and the lessee these were charges on the interest of the lessor only. He had granted the term and covenanted for the quiet enjoyment of the whole premises during that term. He was, therefore, bound to protect the estate of his lessee against those claims. So much of the proceeds of sale as have been used to satisfy the mortgage, have been applied to the debt of the lessor, or to the satisfaction of a charge on his estate; and his representatives have had the benefit of them in that manner. So long as the mortgage existed, it was necessary to devote a portion of the rent to the payment of interest. The lessor loses nothing, therefore, by the payment of the principal out of the fund. The payment to the doweress is also properly payable out of the moneys which the heirs of the lessor would have received had there been no widow, and should not be taken into

account in considering the rights of the lessee. Even if interest on the proceeds represented the value of the rental, it would be manifestly unreasonable to hold, that for the purpose of computing the interest of the lessee, he should be allowed only the interest of the surplus, remaining after nearly one-half of the proceeds had been consumed in satisfying these claims, and still be charged with the rent which he had covenanted to pay for the whole of the premises. The burden of the claims which, as between the lessor and lessee, the former was bound to provide for, would thus be transferred to the latter. There is no soundness in the position claimed. The effect of the sale was to substitute the proceeds, so far as they would go, for the several interests in the land sold, but not to change the relative interests of the parties, or their priorities; and neither of them is entitled, out of the proceeds, to more than the equivalent of what he would have enjoyed had the sale not taken place. As between the lessor and lessee, the amount necessary to satisfy the mortgage was always chargeable to the lessor, and continues so notwithstanding the sale. It has gone to pay his debt and the effect is the same as if awarded to him directly out of the fund.

The value of the widow's dower is in like manner, as between the heirs of the lessor and the lessee, chargeable wholly to the former.

By his covenant of quiet enjoyment, the lessor, and those claiming under him, are precluded from setting up this right of dower, for the purpose of reducing the value of the estate conveyed by him to the lessee, and relieving his own estate from that incumbrance. He or his representatives cannot be permitted to allege that the lessee was entitled by the lease, to the enjoyment of only two-thirds of the premises, in the face of his covenant that he should enjoy the whole. Whatever payment was necessary, to extinguish this outstanding right of dower, should be borne by the representatives of the lessor, not by the lessee. The objection that the covenant of quiet enjoyment cannot be enforced in this proceeding, is not available, nor are the rules which would govern an action for the

breach of such a covenant applicable, where the controversy arises, as it does here, between the covenantor and covenantee as claimants in a court of equity of the same fund, and the covenant determines at whose expense, charges or incumbrances on the fund ought to be satisfied. Suppose that an undivided half of a piece of land be conveyed by A to B, with a covenant of warranty and against incumbrances, and it turns out that the land is subject to a mortgage. Can it be doubted that, upon a contest between A and B as to the surplus, arising from the sale of the land under said mortgage, B would be entitled to the surplus, to the extent of the full half of the entire proceeds of sale, though nothing should be left for A, and though the half of the proceeds were more than the consideration paid by B to A, with interest? Could A be permitted to set up, in the face of his covenant, that the interest of B, as well as his own, was subject to the mortgage, or that B was restricted to the damages recoverable upon the covenants in the deed of A? Or, suppose that the conveyance had been made subject to the mortgage, with covenants against other incumbrances, but the wife of A had not joined in the deed, and A had died; is it not clear that, as between B and the heirs of A, the sum to be set apart for the right of dower of the widow of A, should come out of their half of the surplus moneys, and that no part of it should be taken from that of B? In such cases, recourse may be had to the covenants between the parties, for the purpose of determining their equities as between each other. When two parties are claimants of a fund in court, equity should not permit one of them, who has covenanted to protect the title of the other, to increase his own share of the fund, by compelling the share of the party whose estate he has covenanted to protect, to contribute to the discharge of prior encumbrances on the property. I can see no possible objection, when both parties are before the court as claimants, and the contest is between them only, or between parties claiming under them, to making a final disposition of the fund, in accordance with the covenants existing between them, and

the equities resulting therefrom. The decision in the case of *Burr* v. *Bryan*, turned upon the point that the lessor, at the time of executing the lease, had no title to the property, and that the lease contained no express covenant of quiet enjoyment, but did contain a covenant against the acts of the lessor, which excluded the implied covenant of quiet enjoyment, which would otherwise have existed; that, therefore, the lessee had no estate in the land, and the lessor had made no covenant which precluded him from setting up a title in himself, acquired subsequently to the lease. The case was a peculiar one, and the judgment therein does not conflict with the views here expressed.

On the hearing before the referee, in pursuance of the order of the General Term, setting aside his first report and referring the case back, evidence was given as to the fair annual rental of the property, for the purpose of establishing the value of the term. This was objected to by the counsel for the executors, as not being in conformity with the decision of the court at General Term. That objection was overruled, but the counsel for the executors seems to have reposed upon it, and not to have offered any evidence on his part on the subject of value, further than computations based on the proceeds of sale. We think he had a right to repose upon that objection, as the case then stood. The court had decided that the proceeds of the sale should be taken as the value of the fee, and that the opinions of witnesses, as to a value of the term, should not be resorted to, if the value could be ascertained by calculation on that assumption; and the referee was, by the order, directed to report according to the views expressed in the opinion of the court. The executors should have an opportunity of adducing evidence on the question of the value of the term, on a hearing on which that question is properly triable as a question of fact. We do not, therefore, think that the valuation found by the referee in his report dated June 21, 1870, should be adopted; but the order of the Special Term dated September 27, 1870, and of the General Term dated April 26, 1871, should be reversed, and it should

be referred back to the referee, to ascertain the value of the term, according to the views herein expressed, and to report upon the matters referred to him by the original order of reference.

All concur, except GROVER, J. dissenting, and ALLEN, J., not voting.

Ordered accordingly.

JAMES GARVEY, Appellant, *v.* NATHANIEL JARVIS et al., Respondents.

One M. held a judgment against plaintiff for over $2,000. He proposed to plaintiff to discharge it for $500. This offer was not accepted. R., a stranger to plaintiff, by falsely representing that he was a friend of, and came from plaintiff, induced M. to assign the judgment to him for $500.—*Held*, that the only one injured by, or who could complain of the fraud, was M., and that plaintiff was not entitled to the benefit of the purchase. (RAPALLO and PECKHAM, JJ., dissenting.)

(Argued February 23d, 1871; decided November 10th, 1871.)

APPEAL from judgment of the General Term of the first judicial district, affirming judgment entered upon decision of court dismissing plaintiff's complaint.

The court found the following facts: That about the 1st day of November, 1861, the defendant, Malcolm, recovered a judgment against the plaintiff and one Peter Ziglio for $2,202.90, which he still owned in January, 1867, there having been a sum of $200, paid upon it by Garvey, in October 1866, the balance remaining unpaid.

That in January, 1867, Malcolm promised plaintiff, that he would satisfy and discharge said judgment against him for $500, but plaintiff did not then accept the offer.

That Malcolm, while still willing to discharge said judgment for that sum was, upon the false representation of defendant, Roach, that he came from and was a friend of

plaintiff, induced to and did assign the judgment to Roach upon the payment of $500.

Upon obtaining the assignment, Roach immediately took supplementary proceedings against plaintiff on the judgment, and obtained $1,200 from him by means thereof.

Upon discovering the fraud of Roach, Malcolm brought a suit to set aside the sale and assignment to him, which was compromised on the 11th of June, 1867, by an assignment of the judgment to Jarvis to collect it, and to pay to Malcolm $943, and to Roach $750, the balance due thereon, and said Jarvis still holds the judgment.

That plaintiff never paid the $500 to Malcolm, nor did he ever accept the said offer, or tender to Roach, the assignee of said judgment, the $500.

Geo. C. Genet, for appellant. Payment of a less sum than amount of judgment, if received as such, is full satisfaction of judgment. (*Traver* v. *Rankin*, 3 Kelly, Ga. R., 210; *Sewell* v. *Sparrow*, 16 Mass. R., 24; *Milliken* v. *Brown*, 1 Rawle, 391; 2 Parsons on Contracts, 130, note *b*.) The law implies a discharge, when the creditor delivers up the evidence of his claim. (Poth. on Obl. n., 608, 609; Bouvier's Law Dict. Title Release; *Licey* v. *Licey*, 7 Barr. Pa., 251; *Alberts* v. *Ziegler*, 29 Pa. R., 50; *Beach* v. *Endross*, 51 Barb., 570; *Ellsworth* v. *Fogg*, 35 Vt. R., 6 Shaw, 355.) Where trust is created without knowledge of *cestui que trust*, he may affirm and enforce trust. (*Corse* v. *Leggett*, 25 Barb., 393; *Neilson* v. *Blight*, 1 John. Cases, 209; *Lawrence* v. *Fox*, 20 N. Y. R., 268; *Gridley* v *Gridley*, 24 N. Y. R., 130; *Lawrey* v. *Steward*, 25 N. Y., 239; 4 Kent's Com., 307.) Roach having obtained conveyance by fraud, a court of equity makes him a trustee by implication. (Trusts by Tiff. & Ball, title, Implied Trusts, chap. 2, p. 193; *Mulvaney* v. *Dillon*, 1 B. & B., 409; *Moore* v. *Moore*, 1 Seld., 256; *Reed* v. *Norris*, 2 My. & Craig, 361, 374; *Sweet* v. *Jacobs*, 6 Paige, 363; *Morey* v. *Herrick*, 18 Pa.; *Hoge* v. *Hoge*, 8 Watts, 213; *Gardner* v. *Ogden*, 22 N. Y., 327.)

Opinion of the Court, per CHURCH, Ch. J.

CHURCH, Ch. J. The judge before whom this action was tried found, as facts, that one Malcolm held a judgment against the plaintiff for upward of $2,000, and had told the plaintiff, that he would discharge it for $500, but the plaintiff had not accepted the offer; that the defendant (who was a stranger to the plaintiff), having learned of the willingness of Malcolm to discharge the judgment for that sum, applied to him, and by the false representation, that he came from and was a friend of the plaintiff, induced Malcolm to assign the judgment to him, for which he paid $500, and the plaintiff now claims the benefit of this purchase.

The plaintiff had no legal right to have the judgment satisfied or assigned for $500, or any other sum less than the amount of it.

There was no contract to that effect, and if there had been, it would have been invalid for want of consideration. It would have been an executory contract to discharge a debt for less than the face, which, it is well established, is not binding. Such a transaction is effectual only when fully executed as an accord and satisfaction. The plaintiff was not, therefore, legally injured. He was liable to pay the whole amount of the judgment before the assignment, and could not be compelled to pay any more after. He neither lost nor gained by the transaction, in any legal sense. We have been referred by the learned counsel for the plaintiff, to several well established legal and equitable principles, to uphold and sustain the plaintiff's claim, a brief reference to which becomes necessary, in order to ascertain whether any of them are applicable to the facts of this case.

It has been decided by this court that, if one person, for a good consideration, received from another, promises to pay another person a sum of money, the latter can maintain an action upon the contract, although he was not cognizant of it at the time. (*Lawrence* v. *Fox*, 20 N. Y., 272.)

In this case there was no contract, and no consideration to uphold one; and the action is not brought or sought to be maintained upon the theory of a contract, express or implied.

It is claimed however, that upon principles applicable to principal and agent, or trustee and *cestui que trust*, the plaintiff is entitled to maintain the action; that Roach having assumed to act as the agent of the plaintiff, the latter could ratify the act and entitle himself to the benefit of it; and that the defendant holds the judgment as trustee for the plaintiff, and must account to him for it. It is a familiar rule, that the ratification of an unauthorized act of an agent is equal to an original authority. (Dunlap's Paley's Agency, 171, note *a*.) But in this case the essential element is wanting, that the act must be done *for another*. Here it was not so done. The most that can be claimed is, that the defendant said he was acting for the plaintiff, which was false. He paid his own money, and in fact, acted for himself. He was a stranger to the plaintiff, and of course, under no obligation to act for him, and as we have seen, he deprived the plaintiff of nothing to which he was entitled. The cases on this subject, have generally arisen between the principal and the person with whom the agent acted, either to enable the former to derive some advantage or to enforce some liability against him; but in all these cases the agent acted for the principal, and the act was assumed by him, with the assent of the agent. It has been held, that where A does an act as agent for B, without any communication with C, the latter cannot afterward, by adopting it, make A his agent, and thereby incur any liability or take any benefit under the act of A. (*Wilson* v. *Tumman*, 6 Mann & Gran., 236.)

No authority has been cited, and I think it safe to assert that none exists, in which any court has ever held, that a false declaration of agency for another, enables the latter as against the alleged agent, to receive the benefit of an act actually performed for the latter, unless the act was performed under such circumstances as to create an estoppel, or unless the assumed principal has been deprived of some legal right, or otherwise injured. There is no *estoppel* in this case. The plaintiff neither did anything, nor omitted to do anything in

consequence of the statement of the defendant, and he was deprived of no legal right.

But it is urged by the plaintiff, that the defendant held the judgment as trustee for him; that Malcolm assigned it believing that it was for the plaintiff, that the defendant procured it by a fraud; and that in such cases a trust is raised *ex maleficio*, and the fraudulent recipient is turned into a trustee "to get at him." I have examined all the cases cited, and none of them makes the principle invoked applicable to the facts of this case.

It may be laid down, as a general rule, that this principle does not apply, unless the defendant occupies some fiduciary relation to the party making the claim, or that the former owed to the latter some duty or obligation with respect to the property. A stranger cannot claim the benefit of a purchase of property by another, merely because the latter falsely stated that he was acting for the former. It is undoubtedly true, that an officious intermeddler with the rights and property of another, will not be allowed to reap any advantage to himself in dealing with the property of another, but will be held to account in respect to it as a trustee. Such was the case of *Mulvany* v. *Dillon* (1 Ball & B., 409).

The defendant, by collusion with one executor, induced a co-executor who was in possession of a farm, held for the estate under a lease, by threats and intimidation, and by interfering to prevent the sub-tenants from paying the rent, to quit the farm and surrender the lease, and then took a lease of the same premises in his own name at a less rent. He also assumed to act for the devisees, who were infants, by renewing a lease of another farm in which he expressly declared the trust. It will be seen that here was an interference as trustee with the property of the estate. The *Lord Chancellor*, in delivering the opinion, states the question to be "whether *Sir William Dillon* had so far interfered in the management of the assets, as to charge him with a fiduciary character, and to preclude him from taking a benefit to himself in this trust property." He then proceeded to state the

facts, and held that his procuring the surrender of the old lease, and procuring the new one, was but a more circuitous mode of purchasing; and then held, that he occupied such a position, that he could not purchase for himself, and said, "it is perfectly clear, that he principally interfered and acted in the management of this part of the property, and made himself a sort of agent to the executors, or indeed acted as an executor. If he then, acting in that capacity, purchased the estate of an infant, he does so at his peril. * * * * * It is proved that *Sir W. Dillon* has, in an unlimited manner, acted in this trust; and he was well aware of the trust imposed on him, and the situation in which he was placed, for he declared the trust of the renewed lease of *Bogside*. * * * * * For when *Sir W. Dillon* took the active part he did, in the affairs of these infants, he clothed himself with a trust."

I have cited from this case, because it seems to be the strongest referred to, for the plaintiff's position, but it differs from this case in the essential circumstance, that the interference was with rights and property which the plaintiff possessed and owned, and in thus acting the defendant "clothed himself with a trust." In this case nothing was obtained to which the plaintiff had any legal right. He was, at most, only prevented from obtaining the voluntary clemency of his creditor, an interest too unsubstantial for judicial protection. The defendant committed a fraud, but it was a fraud upon Malcolm, and not upon the plaintiff, and this is the difficulty with the plaintiff's case. It is said that Malcolm put the judgment in the defendant's hands for the plaintiff, and that the plaintiff had the legal right to accept and receive it. True, Malcolm was willing to accept $500 from the plaintiff for the judgment, and in assigning it, he supposed he was doing it for the benefit of the plaintiff; but such was not the fact. The assignment was, in fact, received for the benefit of the defendant, and induced by his fraud, and this brings me to another feature of the case, which I regard as material, in determining the rights of the plaintiff

to relief. Malcolm was the injured party, and he commenced an action to set aside the assignment, which was compromised before trial, by an arrangement between him and the defendant, by which they agreed to divide the judgment between them. The original agreement of purchase by the defendant was substantially set aside, by this arrangement, by the parties themselves, for the falsehood and fraud of the defendant, and all this was done before the present action was commenced. Suppose the defendant, on being charged by Malcolm, had surrendered the judgment, and reassigned it, and thus rescinded the contract, what possible claim would the plaintiff have had against either the defendant or Malcolm? No one will pretend that he would have had any. If not, how is his condition improved by the circumstance that Malcolm, upon a compromise of the disputed question, whether there was a fraud or not, agreed that the plaintiff might have an interest in the judgment? In the one case, the defendant would have yielded up the whole of the fruits of the alleged fraud to the party defrauded; in the other, he was permitted to retain a portion, not by virtue of the original transaction, but as a settlement of the question, whether a fraud was in fact committed. Malcolm had a right to let the defendant have a portion of the judgment, either with or without consideration; and the defendant holds his interest now, not by the purchase induced by his falsehood, in relation to the plaintiff, but under the new agreement, made upon the rescission of it.

The plaintiff is a stranger to this transaction, and has no interest in it, legal or equitable. It was very uncivil in the defendant, Roach, to purchase the judgment and enforce it against the plaintiff, and as a question of abstract morals, indefensible toward the plaintiff; but it belongs to that class of wrongs which cannot be redressed in courts of justice. As to the plaintiff, there was neither fraud or damage, both of which are indispensable to the maintenance of such an action.

The judgment must be affirmed.

Dissenting opinion, per RAPALLO, J.

RAPALLO, J., read a dissenting opinion, maintaining that the assignment of the judgment, having been intended by Malcolm for the benefit of Garvey, and Roach with knowledge of this, having procured it to be made to himself, by representing to Malcolm that he, Roach, came from Garvey, and was acting for his benefit, and the assignment having thus been delivered to and received by Roach, in the assumed character of Garvey's representative, Roach, in fact, received it as trustee for Garvey.

That Garvey had the right to affirm this trust, and claim the benefit of it, though created without his previous authority, knowledge, or privity.

And that the title having passed by a perfect assignment, the trust could be enforced, though voluntary. (4 Kent Com., 307; 4 Johns. Ch., 136; 1 Johns. Cas., 205; 1 Johns. Ch., 119, 473; 3 Johns. Ch., 261; 5 Hill, 586; *Bill* v. *Cureton*, 2 M. & K., 510; *Petre* v. *Epinasse*, 2 M. & K., 496; Adams Eq., 31; 11 Wend., 249, 250.)

That the maxim "*Omnis ratihabitio retrotharitur, et mandato equiparatur*," was applicable to this case. (Dunlap's Paley on Agy. 324; Broom's Leg. Max., 835; 6 M. & Gr., 242; 4 Exch. R., 798, 799.)

That to entitle Garvey to adopt and enforce the trust, it was not necessary, either that he should have had any previous title or right to the property, or that any relation should have previously existed between him and Roach, by virtue whereof Roach owed a duty to Garvey, other than that which sprang out of the transaction itself, citing *Marriot* v. *Marriot* (1 Stra., 666, 673); 1 Phil. Ch., 133, 145; 5 Beavan, 469; 9 Ves., 516; 3 Ves., 155; 7 Sim., 644; 3 My. & Cr., 229; 11 Ves., 638; *Sweet* v. *Jacocks* (6 Paige, 359); 1 Ball & Beatty, 409; Story Eq., § 256, 781.

That Roach could not be permitted to set up his own fraudulent intent to appropriate the property to himself, in negation of the trust in favor of Garvey, which he ostensibly assumed, and by assuming which he obtained the assignment.

That Garvey's rights were, therefore, the same as if Roach

had actually intended, at the time he took the assignment, to hold it for Garvey's benefit. He actually took it for Garvey, notwithstanding any secret intent he may have had to defraud him.

That Garvey could not be deprived of his right to affirm the trust, by any subsequent dealing between Malcolm and Roach, to which he was not a party. (4 J. Ch., 136; 1 How., 476; 2 M. & K., 496; 3 M. & K., 36, 43; 5 Hill, 585, 586.)

For affirmance, Ch. J. ALLEN, GROVER and FOLGER, JJ.; for reversal, RAPALLO and PECKHAM, JJ.

Judgment affirmed.

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CHRISTIAN DETMOLD, Respondent, *v.* P. H. DRAKE and DEMAS BARNES, Appellants.

The provision of section 178, of the "act to reduce several laws relating particularly to the city of New York into one act" (Revised Laws of 1813, chap. 86, Davies' Laws of N. Y., 534), which declares that upon the confirmation of the report of the commissioners of estimate and assessment, the mayor, etc., shall be seized in fee of the lands required for the opening or widening of streets, and the provision of section 181, of the same act, which declares all leases of lands thus taken void after such confirmation, is so modified by the provisions of chapter 210, Laws of 1818, which authorizes the city to suspend the opening, etc., of any street for a period not exceeding fifteen months, that the title of the city does not become absolute, until the corporation takes possession, or until the time fixed for the suspension of the work, or the fifteen months expires, and until the title of the owner is thus fully divested, he can recover for the use and occupation of the premises.

Under the construction thus given, these statutes are constitutional, at least, the owner has the right to waive the constitutional objection, and accept the use of the premises, as a compensation for the postponement of the payment of the amount awarded to him, and no one else can complain.

(Submitted May 22th, 1871; decided November 10th, 1871.)

APPEAL from a judgment of the General Term of the New York Common Pleas, affirming a judgment entered upon the report of a referee in favor of plaintiff.

Statement of case.

Action for use and occupation of a store in the city of New York, for a quarter ending in May, 1868.

The plaintiff, by lease dated March 8th, 1866, demised to the defendants the store and lot No. 105 Liberty street, New York, for five years from May 1st, 1866, at the annual rent of $5,000, payable on the usual quarter days.

The lease contained the following clause: "And in case the city of New York shall take statutory proceedings, for the opening of any new street through the block in which said premises are situated, and shall require and take for such purpose the whole or any part of said premises, then upon confirmation of the report of the commissioners appointed in said proceedings, this lease shall become null and void, and the term and letting herein named shall, thereupon, cease and determine."

The defendants entered under this lease, and continued in possession until after the commencement of this action.

They paid rent regularly up to and including the quarterly payment, which fell due February 1st, 1868.

The report of the commissioners appointed in the proceedings to extend Church street, was confirmed by the Supreme Court at General Term, December 31st, 1867; proceedings being taken under the act of 1813, ch. 86, § 177, seq. Defendants paid the February quarter's rent, without knowing that the assessment had been confirmed.

The greater part of the premises in question was taken for the street; a strip on the westerly side, about five feet wide in front, and two feet wide in the rear, by the whole depth of the lot, being left unappropriated.

No steps whatever were taken by the city authorities, to assume possession of the premises before commencement of this suit.

Previous to the commencement of this action, the city had never demanded possession of the premises, nor had the plaintiff received his award, although he had demanded it.

The city has never claimed rent either from the plaintiff or the defendants.

The defendants refused to pay the full rent May 1st, 1869, but tendered $181, as the proportionate amount due for the strip not taken for the street. This was refused, and this suit was commenced to recover the full quarter's rent due that day.

The action was commenced in the Common Pleas, New York, May 27th, 1868.

E. L. Fancher, for appellant. The fee passes to the city upon confirmation of the report. (Davies' Laws of N. Y., p. 529, 534, 538; Laws of 1813, ch. 86, § 178; Valentine's Laws, p. 1198; Hoffman's Treatise on the Corporation, p. 289; *The People* v. *Kerr*, 27 N. Y. Rep., 196, 197, 211; Hoffman's Treatise, 289; *Heyward* v. *The Mayor, etc.*, 7 N. Y., 319; Matter of Seventeenth street, 1 Wend., 262; *Drake* v. *Hudson River R. R. Co.*, 7 Barb., 508; *Williams* v. *N. Y. C. R. R. Co.*, 16 N. Y., 101; *Know* v. *Mayor, etc.*, of N. Y., 38 How. Pr. Rep., 72.) No interest or right is left in the persons from whom the lands are taken. (*The People* v. *Kerr*, 27 N. Y., 196, 211; *Heywood* v. *The Mayor*, 3 Seld., 314.) The right of plaintiff to the rent went with the title. (Washburn on Real Prop., 337; 1 Greenleaf Crim. Dig., 822; *Birch* v. *Wright*, 13 R., 378; *Demarest* v. *Willard*, 8 Cow., 206; *Bruden* v. *Thayer*, 3 Met., 76; *Peck* v. *Northrup*, 17 Conn., 217; *Van Wicklen* v. *Paulson*, 14 Barb., 654; *Nelles* v. *Lathrop*, 22 Wend., 123.) Tenant may show the landlord's title has been extinguished. (*Despard* v. *Walbridge*, 5 N. Y., 378; *Jackson* v. *Rowland*, 6 Wend., 670.) The statute terminates the lease, and an apportionment of rent is allowed as a damage to the landlord. (*Gillespie* v. *Thomas*, 15 Wend., 464; *Astor* v. *Hoyt*, 5 Wend., 603; Matter of Albany street, 11 Wend., 609; Matter of William street, 19 Wend.; *Gillespie* v. *Mayor, etc., of N. Y.*, 23 Wend., 643.) It is not necessary that the property taken should be paid for before appropriation. (*Bloodgood* v. *M. and H. R. R. Co.*, 18 Wend., 9; *Townsend* v. *M. C. and B. Co.*, Ct. of Appeals, N. Y. Transcript, 9 Jan., 10, 1869;

Rogers v. *Bradshaw*, 21 John., 744; *Calking* v. *Baldwin*, 4 Wend., 667; *Case* v. *Thompson*, 6 Wend., 634; *Rexford* v. *Knight*, 11 N. Y., 308.)

G. D. F. Lord, for respondent. The title of the premises remains in plaintiff, until possession is required for public use. (Constitution, art. 1, § 6; Matter of Albany street, 11 Wend., 149, 1834; *Embury* v. *Connor*, 3 Comst., 511, 1850; Matter of John and Cherry streets, 19 W., 659; *Bloodgood* v. *M. R. R. Co.*, 18 Wend., 59; Fletcher on Trustees, 49, 50; Lewin on Trustees, 234; *Embury* v. *Conover*, 3 Com., 511; Matter of Albany street, 11 Wend., 149.)

By the Court—PECKHAM, J. By the terms of the lease between these parties, it terminated and became void, upon confirmation of the report of the commissioners of assessment, in opening the new street. But the defendants continued to occupy the premises up to and after the first of said May, under an arrangement, that they would pay the rent if they were liable.

The statute of 1813, under which this street was widened, provides, that upon the confirmation of the report of the commissioners of estimate and assessment by the court, the mayor, aldermen, etc., of New York shall be seized in fee of the lands, etc., in the report mentioned, required for widening the street. (Davies' Laws of New York, 534.)

The act also makes all provisions of a lease thereafter void (§ 181, p. 537), and requires the city to pay the assessment within four months thereafter. (Id., 538, § 183.)

The act of 1818 authorizes the city to suspend the opening, etc., of any street for such time as it thinks proper, not exceeding fifteen months in the whole, after the confirmation of the commissioners' report, and that the city shall not be required to pay any assessment for such opening, etc., "until the expiration of four months after the expiration of the time or times, which may be appointed by it for carrying said improvements into effect." (Laws of 1818, p. 196.)

Under the act of 1813, unaffected by that of 1818, clearly this action would not lie. By that act not only the lease is avoided, but the absolute fee is vested in the city, upon confirmation of the report of the commissioners by the court. True, the party entitled does not receive his award until four months thereafter, and perhaps, the law presumes, that the commissioners took that into consideration, and allowed him interest for those four months in the amount awarded, although the statute in terms authorizes no such allowance. It requires the commissioners "to make a just and equitable estimate and assessment of the loss and damage," etc., by reason of the taking of the property. (Id., 529, § 178.)

To hold this act constitutional, either the commissioners must allow interest, or the absolute title must vest in the corporation when the money is due.

But the act of 1818 allows the whole matter to be suspended by the corporation, for not exceeding fifteen months after the confirmation of the report of the commissioners, and the corporation has four months thereafter in which to pay awards of damages.

No compensation is provided by the act, for the owner whose land is taken, for this delay of payment for nineteen months.

These acts were both passed, when the Constitution of this State, contained no provision as to compensation for property taken for public use.

To uphold them, they must substantially comply with the present Constitution, and must make "just compensation" for property taken for public use.

Liberally construed, with a view to attain the proposed ends, viz., the acquisition of the property when required for public use, and the payment of a just compensation, I think both acts may be upheld.

If the corporation does suspend the taking of possession of the property for fifteen months, it is clear that the public does not require that property for that time, and the fee of the corporation, is subject to the right of the owner to occupy till that time.

But suppose the corporation does not suspend, by any affirmative act, as it has not in this case, the result, it seems to me, is the same, if in fact it does not take possession.

When must it act? The act does not state. There is nothing in the act to prevent the corporation from declaring, in the twelfth month after the report is confirmed, that all proceedings for widening this street are suspended for three months. It cannot suspend more than fifteen months in all; but it may suspend for the residue, at any time prior to the expiration of the whole time.

Then why should not the plaintiff recover for use and occupation by the defendant during those fifteen months?

It is said the rent passes with the reversion; that when the title passes, the rent thereafter passes as an incident. "As a general proposition, having few exceptions, the transfer of a reversion carries with it the rent due and accruing thereafter." (Wash. on Real Prop., 451, and cases there cited.) There are exceptions. (8 Cow. R., 206; 29 N. Y., 147.)

Of course, where one takes an absolute fee, he takes everything necessary to make it so. If an outstanding tenancy were necessary, he must take that.

But by the construction given to these statutes, the owner of the land taken has some estate in it, until the expiration of the fifteen months, unless the corporation sooner takes actual possession, or suspend the proceedings for a shorter period, as before stated; and I see no legal objection to his recovering for use or occupation, for such time as he has the rightful possession and allows another its use.

Under these acts, the corporation would be bound to demand possession of the premises, before it could proceed summarily to dispossess an owner, if it took possession prior to the expiration of the fifteen months after confirmation of the report.

As, unless the corporation suspends the proceedings prior to the expiration of that time, and for a less time than fifteen months, the owner cannot know when, before the expiration

of the fifteen months' time, the corporation will want the possession.

When the corporation takes possession, or when the corporation suspends, or the whole fifteen months expires, then the title of the city becomes absolute, and the rent must cease.

The construction thus given sustains the constitutionality of these statutes, and I think is in harmony with the interests of the city and of property owners.

This mode of reaching the result, is founded upon the idea, that there is some interest left in the owner, until he is either paid for the property, or possession thereof is taken by the city. That the two acts of 1813 and 1818 should be construed together, and that thus the intention of the legislature is plain, that the property is not taken until it is either actually taken possession of within the fifteen months, or until the expiration of that fifteen months, within which the corporation has power to suspend proceedings; thus leaving the owner in possession for that time, unless by some action he is sooner ejected.

No compensation can be presumed to have been allowed to the owner for the fifteen months' suspension, because it may be that there will be no suspension at all, that possession will at once be taken; or, if not immediately, then very soon; but when particularly, is wholly unknown.

No compensation, then, is made to the owner, for postponing the payment of compensation for his lot for fifteen months, unless he takes the use of the lot or its rent for that time.

If this be regarded as not a "just compensation," then the act of 1818 must be held unconstitutional.

The provision, it may be observed, of awarding compensation to the owner for taking his property, is for the owner's benefit. If it be not "just," within the meaning of the Constitution, then that mode of taking the property may be held to be unconstitutional. But as the provision is made for the benefit of the owner, he has a right to be satisfied with it, and to waive any constitutional objection thereto.

In this case, it seems, he has so acted. He has kept the premises and demands the rent, according to the force of the act of 1818. No one else demands it; the corporation does not claim it; the defendant has no right to it.

By claiming and accepting this rent, the plaintiff declares his acceptance, as a compensation for postponing the payment of the money awarded to him for taking his property.

If he be satisfied with the compensation, I do not know who can complain. (*Embury* v. *Conner*, 3 Comst., 511; *Baker* v. *Braman*, 6 Hill, 47; *Lee* v. *Tillotson*, 24 Wend., 337.)

The judgment should be affirmed.

Ch. J. Allen and Folger, JJ., concur. Grover and Rapallo not voting.

Judgment affirmed.

Barzalier McNeil, Respondent, *v.* The Tenth National Bank of the City of New York, impleaded with others, Appellants.

Where the owner of property confers upon another, an apparent title to, or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner.

The rights of such third party, do not depend upon the actual title or authority of the one with whom he dealt, but upon the act of the owner, which precludes him from disputing the title or authority, he has apparently conferred.

Plaintiff was the owner of 134 shares of the stock of the First National Bank of St. Johnsville, the certificate of which he delivered to and left with G. B. & D., his stock brokers, to secure any balance of account. Upon the certificate was indorsed a blank assignment, and power of attorney to transfer, signed by the plaintiff, purporting on its face to have been executed "for value received." Plaintiff's indebtedness on the account was $3,000, and interest. G. B. &. D., without authority, and without plaintiff's knowledge, pledged the scrip with other securities, to secure an advance of $45,135. Defendant at the request of G. B. & D., paid the advance and received the securities. The other

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Statement of case.

securities were sold, leaving $15,219.81 of the advance unpaid.—*Held*, that defendant was entitled to hold the stock, for the full amount remaining unpaid.

(Argued April 21st, 1871; decided November 10th, 1871.)

Appeal from a judgment of the General Term in the fourth district, affirming a judgment entered in Montgomery county, in favor of the plaintiff on the report of a referee.

The action was brought, to compel the surrender to the plaintiff of 134 shares of the capital stock of the First National Bank of St. Johnsville, which had been acquired by the appellant in the following manner:

In November, 1866, the plaintiff then being the owner of the shares in question, had an account with Goodyear Brothers & Durant, of the city of New York, stock brokers, relating to other stocks, which they had purchased and were carrying for him. For the purpose of securing any balance which might become due them on that account, the plaintiff delivered to and left with them, the certificate of the 134 shares in dispute, with a blank assignment, and power of attorney to transfer indorsed thereon, signed by the plaintiff, in the following words:

For value received, the undersigned hereby assigns and transfers unto * * * * shares of the capital stock of the First National Bank of St. Johnsville, and do hereby constitute and appoint * * * true and lawful atttorney, irrevocable for * * * and in * * * name and behalf, to make and execute all necessary acts of assignment and transfer required by the regulations and by-laws of said bank.

In witness whereof, I have hereunto set my hand and seal, this —— day of ——.

(Signed.) B. McNEIL.

Sealed and sworn in presence of——.

On the 18th of June, 1868, at the city of New York, the appellant at the request of Goodyear Brothers & Durant, paid the sum of $45,135 to Fred. Butterfield, Jacobs & Co.,

receiving from them certain securities, including the certificate and power for the 134 shares in question, which had been previously pledged by Goodyear Brothers & Durant to Fred. Butterfield, Jacobs & Co.

Goodyear Brothers & Co. were at that time insolvent, and indebted to the appellant. In pledging the plaintiff's shares, they had acted without actual authority from him, and without his knowledge. He was indebted to them, on the account for which the shares were pledged to them, in the sum of $3,000, with interest from December 1, 1866; but the account had not been rendered, or any demand made.

The appellant, at the tim of receiving the shares, had no knowledge of the plaintiff' erest therein.

The cashier of the appel ithin a few days after receiving the certificate, assignm power, filled in the blank in the assignment and pow H. Stout, cashier, Tenth National Bank, New Yo and thirty-four," and dated the same the 19t 1868, and sent the scrip to the First Nati hnsville, for the purpose of having the s e books accordingly; but such transfe er of injunction in this action.

The plaintiff deman... ler of the scrip, on payment of the balance due by ... odyear Brothers & Durant; which demand was refused.

The value of the shares was $17,420. The balance of the advance made by the appellant thereon ($45,135, less the proceeds of the other securities received therewith, $29,915.19), was $15,219.81, besides interest.

When the certificate and power came to the possession of the appellant, they bore the proper revenue stamp, duly canceled with the stamp of Goodyear Brothers & Durant, and the name of Ch. Goodyear as subscribing witness to the power. The referee found, that when the plaintiff delivered them, they were not stamped or witnessed, and that the plaintiff had never authorized those acts.

The referee found in favor of the plaintiff, and in con-

formity with his report, a judgment was entered, requiring a surrender of the scrip to the plaintiff, on payment by him of the $3,000 and interest due by him to Goodyear Brothers & Durant.

This judgment was affirmed at General Term, and an appeal taken to the late Court of Appeals, where, after argument, that court was divided and a re-argument ordered. The case now comes up on the re-argument.

E. L. Fancher, for appellant. Plaintiff constituted Goodyear Bro.'s & Durant his agents, with power to sell; and if the agents deviated from instructions, still plaintiff is bound. (Story on Agency, § 127, 131; *Com. Bank of Buffalo* v. *Kortright*, 22 Wend., 361; *Sargent* v. *Franklin Ins. Co.*, 8 Pick., 90.) Defendant as *bona fide* holder had the right to fill up the blanks, and to require a transfer of the shares on the books of the bank. (*Com. Bank of Buffalo* v. *Kortright*, 22 Wend., 348; S. C., 20 Wend., 92; *Fatman* v. *Lobach*, 1 Duer, 534; *Bank of Utica* v. *Smalley*, 2 Cow., 770; *Little* v. *Barker*, 1 Hoff. Ch. Rep., 487; *Boyson* v. *Coles*, 6 Maule & Selw., 14; *Crocker* v. *Crocker*, 31 N. Y., Rep., 507; *Bank of Buffalo* v. *Kortright*, 22 Wend., 361; *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 80.)

S. Hand, for respondent. Defendant is not a *bona fide* holder without notice. (15 N. Y., 360; 27 How., 1; 49 Bar., 364; 20 Wend., 277.) The court will not disturb the referee's finding. (5 Duer R., 216; 3 Comstock, 168; 7 Bosworth, 394; 35 How. P. R., 286; 3 E. D. Smith's Reports, 98; 36 N. Y., 342.) The certificate is not negotiable, and a *bona fide* assignee takes subject to equities. (13 N. Y., 600; 6 Duer, 574; 28 N. Y., 604; 34 N. Y., 80; 22 N. Y., 535.) G. B and D. could not sell without first demanding payment and giving plaintiff notice of time and place of sale. (4 Denio, 227; 7 Hill, 501; 2 Comstock, 443; 25 Howard, 261; 16 N. Y., 392; 25 How., 284; 40 Barb., 648; *Markham* v. *Jaudon*, 2 Hand, 235.) The legal title remained in plaintiff

until actual transfer on the books of the bank. (13 N. Y., 625; 2 Wheaton, 393; 34 N. Y., 80.) Until then the prior equities will prevail. (3 Paige, 361; 6 Duer, 574.)

Rapallo, J. The pledge of the plaintiff's shares by his brokers, for a larger sum than the amount of their lien thereon, was a clear violation of their duty, and excess of their actual power. And if the effect of the transaction was merely to transfer to the appellant, through Fred. Butterfield, Jacobs & Co., the title or interest of Goodyear Brother and Durant in the shares, the judgment appealed from was right.

It must be conceded, that as a general rule, applicable to property other than negotiable securities, the vendor or pledgor can convey no greater right or title than he has. But this is a truism, predicable of a simple transfer from one party to another where no other element intervenes. It does not interfere with the well-established principle, that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence he caused or allowed to appear to be vested in the party making the conveyance. (*Pickering* v. *Busk*, 15 East, 38; *Gregg* v. *Wells*, 10 Adol. & El., 90; *Saltus* v. *Everett*, 20 Wend., 268, 284; *Mowrey* v. *Walsh*, 8 Cow., 238; *Root* v. *French*, 13 Wend., 570.)

The true point of inquiry in this case is, whether the plaintiff did confer upon his brokers such an apparent title to, or power of disposition over the shares in question, as will thus estop him from asserting his own title, as against parties who took *bona fide* through the brokers.

Simply intrusting the possession of a chattel to another as

depositary, pledgee or other bailee, or even under a conditional executory contract of sale, is clearly insufficient to preclude the real owner from reclaiming his property, in case of an unauthorized disposition of it by the person so intrusted. (*Ballard* v. *Burgett*, 40 N. Y. R., 314.) "The mere possession of chattels, by whatever means acquired, *if there be no other evidence of property or authority to sell from the true owner*, will not enable the possessor to give a good title." Per Denio, J. in *Covill* v. *Hill* (4 Den., 323).

But if the owner intrusts to another, not merely the possession of the property, but also written evidence, over his own signature, of title thereto, and of an unconditional power of disposition over it, the case is vastly different. There can be no occasion for the delivery of such documents, unless it is intended that they shall be used, either at the pleasure of the depositary, or under contingencies to arise. If the conditions upon which this apparent right of control is to be exercised, are not expressed on the face of the instrument, but remain in confidence between the owner and the depositary, the case cannot be distinguished in principle, from that of an agent who receives secret instructions qualifying or restricting an apparently absolute power.

In the present case, the plaintiff delivered to and left with his brokers, the certificate of the shares, having indorsed thereon the form of an assignment, expressed to be made "for value received," and an irrevocable power to make all necessary transfers. The name of the transferee and attorney, and the date, were left blank. This document was signed by the plaintiff, and its effect must be now considered.

It is said in some English cases, that blank assignments of shares in corporations are irregular and invalid; but that opinion is expressed in cases where the shares could only be transferred by deed under seal, duly attested, and is placed upon the ground that a deed cannot be executed in blank.

Without referring to the American doctrine on that subject, it is sufficient to say that no such formality was requisite in this case. It was only necessary to a valid transfer as

between the parties, that the assignment and power should be in writing. The common practice of passing the title to stock by delivery of the certificate with blank assignment and power, has been repeatedly shown and sanctioned in cases which have come before our courts. Such was established to be the common practice in the city of New York, in the case of *The New York and New Haven Railroad Company* v. *Schuyler* (34 N. Y., 41), and the rights of parties claiming under such instruments were fully recognized in that case. And in the case of *Kortright* v. *The Commercial Bank of Buffalo* (20 Wend., 91, and 22 Wend., 348), the same usage was established as existing in New York and other States, and it was expressly held that even in the absence of such usage, a blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment; and that a party to whom it is delivered is authorized to fill it up, by writing a transfer and power of attorney over the signature.

It has also been settled, by repeated adjudications, that, as between the parties, the delivery of the certificate, with assignment and power indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books; that such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and that no effect is given to them except for the protection of the corporation; that they do not incapacitate the shareholder from parting with his interest, and that his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. (Angell and Ames on Corporations, 8th ed., § 354; *Bank of Utica* v. *Smalley*, 2 Cow., 770; *Gilbert* v. *Manchester Co.*, 11 Wend., 627; *Kortright* v. *Com. Bank of Buffalo*, 22 Wend., 362; *N. Y. and N. H. R. R. Co.* v. *Schuyler*, 34 N. Y., 80.)

In the case of *Kortright* v. *Com. Bank*, Chancellor Wal-

worth, in a dissenting opinion, strenuously maintained, in conformity with his previous decision in *Stebbins* v. *Phœnix Ins. Co.* (3 Paige, 356), that by a transfer not on the books, the transferee acquired only an equitable right to or lien on the shares; and that, having but an equitable right or lien, he took subject to all prior equities which existed in favor of any other person from whom such assignment was obtained. (22 Wend., 352, 353, 355.) But his view was overruled by the majority of the court. The action was at law in assumpsit, brought by the holder of the certificate and power, for a refusal to permit him to make a transfer on the books, and the question of his legal title was necessarily involved in the case. The judgment therein must therefore be regarded as a direct adjudication that, as between the parties, the legal title to the shares will pass by delivery of the certificate and power. (See 20 Wend., 362.)

This was reasserted in this court in the *New Haven Railroad Case* (34 N. Y., 80), notwithstanding what was said in the *Mechanics' Bank Case* (13 id., 625).

By omitting to register his transfer, the holder of the certificate and power fails to obtain the right to vote, and may lose his stock by a fraudulent transfer on the books of the company, by the registered holder, to a *bona fide* purchaser (34 N. Y., 80); but in this respect he is in a condition analogous to that of the holder of an unrecorded deed of land, and possesses a no less perfect title as against the assignor and others. And he would have an action against the corporation, for allowing such a transfer in violation of his rights. (Id.) He also takes the risk of the collection of dividends by his assignor, or of any lien the corporation may have on the shares. But in other respects his title is complete.

The holder of such a certificate and power, possesses all the external *indicia* of title to the stock, and an apparently unlimited power of disposition over it. He does not appear to have, as is said in some of the authorities cited, concerning the assignee of a chose in action, a mere equitable interest, which is said to be notice to all persons dealing with him that they

take subject to all equities, latent or otherwise, of third parties; but, apparently, the legal title, and the means of transferring such title in the most effectual manner.

Such, then, being the nature and effect of the documents with which the plaintiff intrusted his brokers, what position does he occupy toward persons who, in reliance upon those documents, have in good faith advanced money to the brokers or their assigns on a pledge of the shares? When he asserts his title, and claims, as against them, that he could not be deprived of his property without his consent, cannot he be truly answered that, by leaving the certificate in the hands of his brokers, accompanied by an instrument bearing his own signature, which purported to be executed for a consideration, and to convey the title away from him, and to empower the bearer of it irrevocably to dispose of the stock, he in fact "substituted his trust in the honesty of his brokers, for the control which the law gave him over his own property," and that the consequences of a betrayal of that trust, should fall upon him who reposed it, rather than upon innocent strangers from whom the brokers were thereby enabled to obtain their money?

These principles, in substance, were applied in the case of *Kortright* v. *The Commercial Bank*. But it is sought to distinguish that case from this; and it is argued, that there the certificate was intrusted to an agent, with authority from his principal to borrow money upon it for the benefit of his principal, and that he simply exceeded his authority by borrowing more than he was authorized to borrow, and absconding with the excess.

The facts were, that the certificate indorsed by Barker, the owner of the shares, was sent by him, together with his note for $10,000, to Bartow, the cashier of a bank in Albany, to obtain a loan of $10,000. Bartow, through an agent in New York, negotiated a loan there, upon the certificate, for $25,000, and absconded. Barker admitted having received the $10,000.

Whether the $10,000 were to be, or were, borrowed by Bartow for Barker, or advanced by Bartow or his bank, does not clearly appear; and the opinions delivered in the case

differ upon the point whether Bartow received the certificate as agent or pledgee. But, assuming that he received it as agent, the ground which lies at the foundation of the decision is, that the possession of the certificate and blank power, gave him an apparent right of control over the stock; that, if the holder of the certificate and power was exhibited to the money dealing public as having the competent right of pledge, disposal and transfer vested in him, by means of all the usual and well known evidences of such right, the private understanding of Barker and Bartow could not affect the rights of those who, if misled, were misled by Barker's own acts.

It is true that Senator Verplanck, in his prevailing opinion, cites authorities on the subject of a deviation by an agent from secret instructions, and treats the case as belonging to that class; but he also rests upon the more general principles above stated, and cites the well known case of *Pickering* v. *Busk* (15 East, 38), where the owner had allowed a broker to be invested with the *indicia* of a legal title to goods, by a transfer of them into his own name on the wharfinger's books.

The principles of agency are, however, applicable to this case. In disposing of a pledge, the pledgee acts under a power from the pledgor. The distinction between a lien and a pledge is said to be, that a mere lien cannot be enforced by sale by the act of the party, but that a pledge is a lien with a power of sale superadded. (Story on Bailments, 7th ed., § 311, note 2; *Wasson* v. *Smith*, 2 B. & Ald., 439.) The pledgee in selling, is bound to protect the interests of the pledgor, and, as to the surplus, represents the pledgor exclusively. Now, for what purpose was the apparent ownership and power of disposition of this stock vested in the brokers? Surely for the purpose of enabling them, effectually and summarily, to execute this power under certain conditions. If the power was absolute on its face, or if the whole legal title was by the instrument apparently vested in the pledgee, and the condition was secret, wherein does the case differ in principle from one of ordinary agency.

I am at a loss to conceive on what principle it can be claimed, that an apparent naked authority is more effectual to bind the party giving it, than an apparent ownership as well as authority.

In the case of *Jarvis* v. *Rogers* (13 Mass., 105), the shares were transferable by indorsement of the certificates. The shareholder indorsed his certificates and pledged them for a debt. The debtor's friend, by his authority, and with his funds, paid the debt and took up the certificates, and the debtor allowed them to remain thus indorsed, in his hands, but not for any specific purpose. This friend afterward pledged them for his own debt, to a party who advanced thereon in good faith. It was decided that the latter could hold them against the true owner.

The court, after distinguishing the case from one of mere bailment, says that after the plaintiff had put his name on the back of the certificates, and allowed them to go into the market with that transferable quality about them, it did not lie in the mouth of him who offered them to the world in that shape, to deny the effect of his own words and actions.

This decision was adhered to, and repeated in *Jarvis* v. *Rogers* (15 Mass., 389), and recognizes substantially the same doctrine as *Kortright* v. *The Com'l Bank*, omitting the element of excess by an agent, of authority actually given, which is supposed to have governed that case.

Fatman v. *Loback* (1 Duer, 354), is a case precisely in point, and I see no ground upon which the conclusions of the learned court in that case can be successfully assailed. The case of *McCready* v. *Rumsey* (6 Duer, 574), which is cited as overruling *Fatman* v. *Loback*, has no such effect. The question in 6 Duer was between the assignee of the shares and *the corporation*, and it was held that the lien of the corporation on the stock for unpaid subscription, was protected where the transfer was not made on the books, a position fully recognized in this opinion, and in the cases I have cited. Moreover in the case in 6 Duer, the general act under which the corporation was formed, provided that

transferees of shares should take subject to the liabilities of prior shareholders.

In the cases of *Ex parte Swan* (7 C. B. N. S., 400); *Swan* v. *The North British Australasian Co.* (7 Hurl. & Nor., 603), and *Same* v. *Same* (2 Hurl. & Coltman, 175), some of these questions received a most elaborate discussion, and there was a strong array of judicial opinions sustaining the validity of transfers of stock, unauthorized in point of fact, on the ground that by mere negligence, and unintentionally, the true owner had enabled another to deliver an apparently valid title to the stock, and thus deceive third parties.

In that case, the plaintiff had intrusted to a broker ten deeds of transfer, executed in blank, for the purpose of transferring certain shares. The broker used only eight of them for the purpose intended, and feloniously filled up and used the others as transfers of other shares, belonging to the same party, forged the name of a subscribing witness, and stole the certificates of the shares from the plaintiff's box, of which the plaintiff kept the key. He then sold the shares to *bona fide* purchasers. He was convicted of the larceny.

In a contest by the owner to get back the shares, the Common Bench was, after two arguments, equally divided upon the question, whether the owner was not estopped from reclaiming the shares, by reason of his negligence in intrusting the blank transfers to the broker, though they were intended for other shares. The case was taken to the Court of Exchequer, and that court was equally divided upon the same question. It was then taken to the Exchequer Chamber, where it was finally disposed of, principally on the ground, that to estop the owner, his negligence must be the proximate cause of the deceit. That here it was too remote, as the blank deeds of transfer were intended for other shares, and the broker had to commit forgery to make them available, and a separate felony to obtain possession of the certificates.

In the case at bar none of these difficulties exist. The assignment and power were intended for these identical

shares; they, as well as the certificate, were voluntarily intrusted by the plaintiff to the brokers, and the latter were thus invested with the apparent ownership and right of disposal, not merely by the negligence of the true owner, but by his voluntary act, and for the very purpose of attesting to the world their title and power, in case the contingency should arise in which, according to the understanding between them and the plaintiff, they would be justified in resorting to the stock for their own indemnity.

Two cases have been cited on the part of the respondent which require notice, viz.: *Covell* v. *The Tradesmen's Bank* (1 Paige, 131), and *Bush, Administrator*, v. *Lathrop* (22 N. Y., 535).

In *Covell* v. *The Tradesmen's Bank*, the complainant, being the owner of a sealed note for $2,425, payable to himself, indorsed it and pledged it to M. for a loan of $1,000. M. indorsed it and pledged it to the bank, defendant, as security for an antecedent debt of $1,000 and a fresh advance of $1,425. The complainant's debt to M. having been paid, he filed his bill against the bank and M. to obtain a surrender of the note.

The chancellor disposed of the case on the ground that the sealed note, being a mere chose in action, was not assignable in law. That the assignee of a chose in action, which must be sued in the name of the assignor, obtains only an equitable interest, the legal title remaining in the assignor; and that the interest of such assignee, being only equitable, was not protected against the prior equity and legal right of the original owner. Thus applying to the assignee of a chose in action the doctrine which he afterward, in the case of *Kortright* v. *The Commercial Bank*, unsuccessfully sought to apply to the transferree, by assignment and power, of shares of stock in a corporation.

He refers to the decision of Chancellor Kent, in *Murray* v. *Lylburn* (2 Johns. Ch., 443), to the effect that the assignee of a chose in action takes subject only to the equities of the debtor, and not subject to latent equities of a third

person against the assignor, and points out that the case of *Redfearn* v. *Ferrier* (1 Dow's Par. R., 50), cited by Chancellor Kent, was decided, not on the ground that the assignee of a chose in action was protected against a latent equity in a third person, but that a share in a joint-stock company was not a chose in action; that the assignee had, according to the law of Scotland, the legal title to the shares, and that the equities of the parties being equal, the court would not divest him of his legal right.

In *Bush, Administrator*, v. *Lathrop* (22 N. Y., 535), the plaintiff's intestate, being the assignee of a bond and mortgage for $1,400, pledged them to Preston to secure $268.20, and delivered them to the pledgee with a note for the amount, and an assignment of the bond and mortgage, absolute on its face, but expressing a consideration of only $268.20, the mortgage being good for its full amount. Preston gave back a receipt, agreeing to redeem the bond and mortgage on payment of the note.

Preston afterward assigned the bond and mortgage to Smith & Norton, who in turn assigned to the defendant for $1,488, advanced by him in good faith. The plaintiff brought his action, to obtain a retransfer of the bond and mortgage on payment of the $268.20, with interest.

Denio, J., in delivering the opinion of the court, reviews the decision of Chancellor Kent, in *Murray* v. *Lylburn*, and other cases, on the subject of latent equities, disapproving of the doctrine of Chancellor Kent, and coming to the conclusion, that an assignment of a chose in action takes but an equitable interest, notwithstanding the provisions of the Code which authorize him to sue in his own name. That all the assignees of the bond and mortgage in question, subsequent to the original obligee, must be regarded as holding merely equitable interests, and that, as between parties so circumstanced, priority of time confers a preferable right (22 N. Y. R., 547, 548); following, substantially, the opinion of Chancellor Walworth, in *Covell* v. *The Tradesmen's Bank*, which he cites.

He concedes that this doctrine forms a serious impediment to his negotiation of choses in action, and alludes to the difference of opinion which may exist as to the policy of encouraging their negotiation, and to the period when it was thought so impolitic, that courts of law would not recognize the rights of assignees. But in no part of his learned and exhaustive opinion, does he seek to apply its doctrine to shares in corporations, or other personal property, the legal title to which is capable of being transferred by assignment, and the free transmission of which, from hand to hand, is essential to the prosperity of a commercial people.

The question of estoppel does not seem to have been considered in that case; and perhaps it would have been inappropriate, inasmuch as the assignment upon which the estoppel could have been predicated, if at all, expressed a consideration of only $268.20 for a good mortgage of $1,400; a circumstance calculated to excite inquiry. But it is sufficient for all present purposes to say, that the reasoning upon which the decision in that case is founded, is totally inapplicable to this.

I have reviewed the authorities at much more length than usual, by reason of the difference of opinion expressed in the late Court of Appeals in this case, and for the purpose of meeting the positions so ably maintained in the opinions, in favor of the respondent, delivered in the court below, and in the late court, on the former hearing.

My conclusion is, that the Tenth National Bank must, on the facts found, be deemed to have advanced *bona fide* on the credit of the shares, and of the assignment and power executed by the plaintiff, and is entitled to hold the stock for the full amount so advanced, and remaining unpaid after exhausting the other securities received for the same advance.

The points relative to the stamp and subscribing witness were fully answered in the opinions delivered on the first argument, and do not appear to have been the subject of dissent. I do not deem it necessary again to discuss them here.

Statement of case.

The judgment of the General Term, and that entered on the report of the referee, should be modified, so as to allow the plaintiff to redeem, on payment of the balance due to the Tenth National Bank, on its advance of June 19th, 1868, and the costs of the action.

All concur except ALLEN and FOLGER, JJ., not voting.

Judgment modified.

CYRENIUS C. TORRANCE, Respondent, *v.* ANSEL F. CONGER, Appellant.

In a deed of a flouring mill and premises, was contained the following grant: "Together with the privilege of taking from the mill race 375 cubic inches of water under thirteen feet head, when there shall be so much water in said race," etc.—*Held*, the deed granted the privilege of taking from the race 375 inches of water and no more, under whatever head the grantee might take it, up to thirteen feet. (RAPALLO, J.)

In any aspect of the case, the reception of evidence of the comparative value of the use of the mill as it was, and as it would be, with a given amount of power, without any evidence that such amount of power would have been obtained, if the stipulated amount of water had been furnished, is error.

(Argued June 14th, 1871; decided November 10th, 1871.)

APPEAL by the defendant from a judgment of the General Term of the Supreme Court in the eighth judicial district, affirming a judgment entered on the report of a referee.

The action is to recover damages for the breach of the covenant, contained in a deed executed by the defendant to the plaintiff, conveying a flouring and grist-mill, and the premises upon which the mill is situated. The covenant, so far as relates to this action, is in the words following:

"Together with the privilege of taking from the mill-race 375 cubic inches of water under thirteen feet head, at all times, when there shall be so much water in said race more

than shall be necessary to drive, advantageously, the grist-mill upon above described premises, with two run of stone, one saw-mill, as the same is now used on said race, the camp factory, the furnace, the carding and cloth-dressing establishment, and the planing-mill, as said furnace, carding and cloth-dressing establishment and planing-mill are now used."

"The said party of the second part, is to bear and pay the proportion of the necessary expenses, of repairing and rebuilding the dam, abutments, gates and race, to conduct the said water, which the said quantity of water shall bear to the whole quantity of water, used for machinery on the said race; the party of the second part is to have the preference to the extent of water sufficient, prudently used, for two run of stones, over all other machinery on the race. * * * The water hereby conveyed, is not to be used for any other purpose than for driving machinery for custom grinding, flouring, and general milling business; and said party of the first part, for himself, his heirs and assigns, covenants and agrees, with the said party of the second part, their heirs and assigns, not to erect any other grist-mill on said race, or convey any water privilege or right on or near said race, for the purpose of being used, or which the grantee or grantees, or their heirs or assigns, shall have the right to use, to run a grist or flouring-mill; and also said party of the first part covenants and agrees to and with the said party of the second part, to furnish said 375 inches of water hereby conveyed in said race, so that the same may be used at all times, except all such reasonable times as may be necessarily consumed in making repairs on said dam, rebuilding the same, and repairs on the abutments, gates and race. * * * It is understood the said party of the first part, is not to furnish the 375 inches of water in times of drought, when there is not sufficient water in the Cattaraugus creek, to supply the same as hereby conveyed, but is, during such scarcity, only to furnish such as runs."

Prior to the execution of the deed, in which the foregoing covenant was contained, there had been other privileges to

the water, in the same race, granted to the other people, by Mr. Plumb, the defendant's grantor, which was known to the parties, when the deed in question was executed and covenant made, namely: A deed bearing date January 20th, 1837, to Asahel Camp; the privilege in this deed is granted in these words, namely:

"Together with the privilege of taking from the mill-race, in Water street, where the flume, conducting water on the lot first above described, now intersects with the said race, water sufficient, by a careful and prudent use, to drive the necessary machinery used in the business of wool-carding, cloth-dressing, and manufacturing wools and cotton cloths, to be used for no other purpose, provided the quantity of water so used, at any time, shall not exceed ninety cubic inches, taken out under ten feet head, at all times, when there shall be so much water in said race, more than shall be necessary to drive, advantageously, a grist-mill with two run of stone, which has the preference in the right of drawing water from the race; the said privilege of using water hereby conveyed, is subject to this condition: That the party of the second part shall bear and pay the proportion of the necessary expenses of repairing and building the dam and race, used to conduct the said water, which the said quantity of water shall bear to the whole quantity of water used for machinery in said race, together with the right and privilege of erecting a building on the said tail-race, west of the piece of land first above described."

Also, a deed dated May 27th, 1865, to Ashbell R. Sellew, Alexander W. Popple and Cyrenius C. Torrance, the plaintiff. The privilege in this deed is as follows:

"Together with the privilege of taking from the race 100 inches of water, or so much water as would pass through an opening of twenty-five inches by four inches, under ten feet head, at all times, when there shall be so much water in the race more than sufficient to drive, advantageously, a grist-mill with two run of stones, one saw-mill and the Camp factory, which have the preference in the right of drawing

water from the race, and which privilege is conveyed subject to the condition that the party of the second part shall pay, or cause to be paid, to the party of the first part, to their heirs or assigns, such a portion of all the necessary expenses hereafter incurred in keeping in repair and rebuilding the dam, abutments, head-gates, waste-gates, and race connected with said privilege, as the water used under this privilege shall bear to the whole quantity of water used by all the machinery in operation on the races at the time such expenditures shall be made."

The race, as constructed, when the covenant was made, could not give a head of thirteen feet. It would not, as constructed when the deed was drawn, hold water with a head of over eleven feet and six inches.

The race was not of sufficient capacity to furnish the 375 cubic inches of water, after furnishing the water which had been granted to the plaintiff and others, with prior right to use the water, over and above what was requisite to operate two run of stone.

Defendant did not furnish 375 feet of water under a thirteen feet head, nor an amount of water equal to it.

Upon the trial the following questions were asked by plaintiff 's counsel:

"Q. What would the annual use of that mill be worth, with a water power of 375 inches, under thirteen feet head, or an amount of water equal to that amount, under a less head?

"Objected to by defendant's counsel as incompetent. 1st. Because it does not furnish a proper rule of damages; and, 2d. That it implies a construction of the covenant not warranted. It is not admissible under pleadings. Objection overruled, and exception.

"A. Rent worth $4,000 a year.

"Q. What was it worth as it was?

"Objection and exception were taken by defendant's counsel.

"A. $2,500 to $2,800.

"Q. What would the rent of the mill be worth with sixty-five horse power?

"Same objection as last above. Objection overruled and exception taken by defendant's counsel.

"A. $3,500 to $4,000."

The referee gave judgment in favor of plaintiff for $1,206.65.

J. Ganson, for appellant. The court, in construing the grant, will look at the surrounding circumstances. (*Strong* v. *Benedict*, 5 Conn., 210, 220; *Kennedy* v. *Scoville*, 12 Conn., 317, 324; *Blossom* v. *Griffin*, 3 Kern., 569.) If the water is in the race, the remedy of plaintiff is against the one diverting it. (*Kennedy* v. *Scoville*, 12 Conn., 317.) Plaintiff could remedy any difficulty which prevented his obtaining his just supply. (*Elliot* v. *Shepard*, 25 Maine, 371.) The referee's construction of defendant's covenant is erroneous. (*Bordwell* v. *Ames*, 22 Pick., 362–368.)

C. C. Torrance, for respondent. That construction is to be adopted most favorable to the covenantee. (*Marvin* v. *Stone*, 2 Cow., 781; 1 Chit. on Cont., 95.) Also that which renders covenant operative. (*Archibold* v. *Thomas*, 3 Cow., 284; *Airy et al.* v. *Merrill*, 2 Curtis R., Circuit Court U. S., 8, 10; *Palmer* v. *Warren Ins. Co.*, 1 Story, Cir. Ct. U. S. Rep., 364; *Snell et al.* v. *Ins. Co.*, 2 Sumn., Cir. Ct. U. S. Rep., 380; *Blacket* v. *Ins. Co.*, 2 Cromp and Jerv., 244–251.) The covenant is a continuing one. (*Crane* v. *Beach*, 2 Barb. S. C. R., 121; *Crane* v. *Beach*, 2 N. Y. R., 92; 2 Saunders, 337, 422, note "A"; 2 Cowen & Hill's Notes, 966.)

RAPALLO, J. The Supreme Court, at General Term, held that the words "375 inches of water under thirteen feet head," as used in the deed from the defendant, were not controlling as to the head under which the water should be taken or furnished, and did not bind the defendant to furnish

any particular head, but were used simply as a measurement of the quantity of water which the plaintiff was entitled to draw from the defendant's race.

According to this construction, the plaintiff had the right to take the water under any head he might elect, and find practicable, so long as he did not consume a greater quantity of water than that which would flow through an aperture of 375 square inches, under a head of thirteen feet.

Consequently, if he took the water under a head of less than thirteen feet, he had the right to enlarge the aperture sufficiently to permit the passage of the same aggregate quantity of water in a given time, which would, during the same time, pass through an aperture of 375 inches if taken under a head of thirteen feet.

The head was, therefore, a matter which did not concern the defendant, but which the plaintiff was authorized to regulate at his own will and upon his own premises, as might according to his judgment, best suit his machinery, so long as he also regulated the size of the aperture in such manner as not to draw from the race a greater quantity of water than he had the privilege of taking.

But the court did not decide that the plaintiff had the right to a sufficient quantity of water to enable him to obtain, under a head of less than thirteen feet, the same amount of *power* which would be given by 375 inches under thirteen feet head It was not proved or found, that under a diminished head, the same amount of power could be produced, without drawing from the race a much greater quantity of water than that which was indicated by the terms of measurement employed in the grant. Nor was that fact capable of proof, as physical laws establish the contrary.

The 375 inches of aperture would, no doubt, pass more water if the head were thirteen feet, than if it were but eleven and a half feet. But it was not and could not be shown that an addition to the head would increase the quantity of water drawn from the race, in as great a ratio as that in which it would increase the power.

Assuming that the true construction of the deed is, that the defendant granted a specified quantity of water, without being bound to furnish the head, it would be manifestly wrong to hold him liable, under any circumstances, to part with or furnish more than the stipulated quantity, or, in case of his failure to furnish the stipulated quantity, to charge him in damages for more than the actual deficiency.

According to the decision of the Supreme Court, the damages recoverable by the plaintiff for a temporary or partial failure in the supply of water, should have been the difference between the value of the use of the mill with the amount of water actually furnished in the race, and what it would have been worth if the defendant had furnished in the race the stipulated quantity of water, viz., sufficient to enable the plaintiff to take under the existing head the same quantity of water which would have passed through an opening of 375 inches, had the head been thirteen feet.

But, instead of following this rule, and taking evidence as to the annual value of the mill under the last mentioned condition, the referee received, under exception, the evidence of various witnesses as to the comparative value of the use of the mill as it was, and with a given amount of power, without any evidence that the amount of power with which its actual state was thus compared, would have been obtained under the existing head, if the stipulated amount of water had been furnished.

One witness was allowed to state, under exception, that, with a water *power* of 375 inches under thirteen feet head, or an amount of water equal to that amount, at a less head, the mill would have been worth $4,000 per annum, while as it was, it was worth only $2,500 to $2,800 per annum. Another, that with a *sixty-five horse power*, it would have been worth $3,500 to $4,000 per annum; there being no proof that the stipulated quantity of water, under the existing head, would give as much as sixty-five horse power.

The court at General Term concede that this evidence was erroneously received, as not furnishing a proper rule of dam-

ages, and also as being based on a construction of the covenant not warranted; but say that the case shows that the referee, in his final disposition of the case, disregarded the construction and the measure of damages implied by the questions and answers, and that the receipt of this incompetent evidence has worked no possible injury to the party excepting.

But unfortunately for this position, it appears that there is no evidence in the case, on the subject of the comparative value of the use of the mill, which is not covered by this exception, and the finding of the amount of damages must therefore have been based upon that incompetent evidence. The question asked of the plaintiff at the close of the case, what the use of the mill would be worth with 375 inches of water under head of eleven and a half feet, might have drawn out an answer which would have formed some basis of calculation, as that head was attainable, and the quantity named was within that to which the plaintiff was entitled; but the answer to the question was not direct or clear. It was, that "with the water supplied so that we can run the mill, under eleven and a half feet head, worth per year $4,000." Taken in connection with the previous testimony on the part of the plaintiff, that a power of 375 inches, with thirteen feet head, or seventy horse power, was necessary to run the mill, the witness can hardly be understood as saying, that in the case supposed by the question the mill would have been worth the sum named. The case states that it contains all the evidence, and I am unable to find any, except that which falls under this exception, upon which the findings of the referee as to the amount of damages, can have been based. The findings themselves are capable of the construction that the referee held the defendant liable for not furnishing an amount of water equal in power to 375 inches under thirteen feet head.

Upon a careful examination of the deed and of the evidence, I came to the conclusion that the deed should be construed as granting the privilege of taking from the race 375 inches of water and no more, under whatever head the plain-

tiff might take it, up to thirteen feet, when there was that amount in the race, over and above what was taken by the other mills, and that if he failed to obtain the full amount of head under which he was entitled to use the water, it was either his misfortune or his fault. The height of the pond and race, and the location of the mill, and the fall to the bed of the creek opposite the mill, were visible at the time of the purchase. The plaintiff could calculate the head that was attainable. The location of the wheels was under the control of the plaintiff on his own premises. He secured the privilege of taking the water under the head which he deemed requisite. The defendant did not agree to furnish the head, but did grant to the plaintiff the privilege of deepening the tail race, and there is nothing to show that the head could not have been readily obtained in that way. The bottom of the tail race was of plank, and it could not be necessary to deepen it merely for the purpose of cleaning it or removing obstructions. These considerations led me to the conclusion that the better construction of the deed was that it gave to the plaintiff only a privilege of taking 375 inches under a head not exceeding thirteen feet, and that he could not in place of taking the whole amount of head, enlarge the number of inches named in the deed.

The court, however, is divided in opinion as to the interpretation of the grant and of the covenant, and nothing is now decided in respect to them; but in any aspect of the case, I am of opinion that the referee erred in receiving the evidence before referred to, and that for that reason a new trial should be granted, with costs to abide the event.

CHURCH, Ch. J., and ALLEN and PECKHAM, JJ., concur.

GROVER, J., dissents; FOLGER, J., not voting.

Statement of case.

JOHN F. BUTTERWORTH, Respondent, *v.* WILLIAM CRAWFORD, Appellant.

The rule of law which creates an easement in favor of one of two tenements or heritages belonging to a single owner, upon the sale of one of them, is confined to cases where there is an *apparent* sign of servitude on the part of the other, which would indicate its existence to a person reasonably familiar with the subject upon an inspection of the premises.

The owner of two adjoining houses and lots in the city of New York, known as Nos. 83 and 85, built a vault half in the lot of each, extended the division fence over the centre of the vault, and then erected an outhouse for each dwelling, on either side of the fence, over the vault. A drain from the vault ran through the lot of No. 85. Defendant purchased No. 85, receiving a full covenant deed without reservation. After that, plaintiff purchased No. 83. Defendant closed up the drain.—*Held*, the servitude was not apparent, and no easement existed in favor of No. 83.

(Argued June 19th, 1871; decided November 10th, 1871.)

APPEAL from judgment of the General Term of the Court of Common Pleas, for the city and county of New York, affirming judgment entered upon the report of a referee.

The facts of this case, as found by the referee, are as follows: Henry Vulkening in 1864 owned two houses adjoining each other on the north side of Forty-sixth street, in the city of New York, known as Nos. 83 and 85 West Forty-sixth street. While such owner, he dug and formed a vault, extending partly into the yard of each house, and constructed a drain from such vault, running through the lot of house No. 85, to the sewer in Forty-sixth street. He then built a division fence between the yards of the two houses, extending from the rear of the houses to the rear of the lots, which fence was upon the division line, and crossed the vault in the center. He constructed an outhouse on either side of such division fence, over the vault for said house respectively, the roof of such outhouse extending a few inches above the fence.

After constructing such vault and outhouses, on the 11th day of December, 1865, he conveyed the house and lot No.

85 West Forty-sixth street, to the defendant in this action, by full covenant warrantee deed.

The defendant, immediately on the receipt of such deed, took possession of the said premises. Thereafter, on the 26th day of January, 1866, Vulkening conveyed said house, known as No. 83 West Forty-sixth street to the plaintiff.

In the summer of 1866, the defendant built a privy on his premises No. 85 West Forty-sixth street, about twelve feet further towards the rear of his lot, and extended the drain to the vault of such privy, and then cut off the connection between that portion of the vault on the plaintiff's lot and the said drain.

The defendant upon the trial offered to show, that there was nothing in the appearance of the premises at the time he bought, to give notice that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel excepted.

The defendant's counsel also offered to prove, that the defendant had no notice when he bought, that the privy was drained through his lot. This was refused by the referee, and the defendant's counsel duly excepted.

The referee, as conclusions of law, decided: That the defendant had no right to cut off or obstruct the communication, from that part of the vault on the plaintiff's lot, through the drain on the defendant's premises to the sewer in the street.

That the plaintiff was entitled to judgment, restraining the defendant from continuing such obstruction, and requiring the defendant to open such drain, and to restore the same to the condition it was in at the time of the said conveyance to the plaintiff.

N. Smith, for appellant. Where the owner conveys the servient tenement unqualifiedly, no easement is created in favor of the dominant tenement. (3 Kent, 448; *Maynard* v. *Esher*, 5 Harris, 17 Penn., 222; *Burr* v. *Mills*, 21 Wend., 290; *Preble* v. *Reed*, 17 Me., 169; *Hawthorne* v. *Stimpson*,

10 Me., 224; *Hazard* v. *Robinson*, 5 Mason, 272; *McTavish* v. *Carroll*, 7 Md., 352; *Johnson* v. *Jordan*, 2 Met., 234; *Callan* v. *Hocher*, 1 Rawle., 108; *Brakely* v. *Sharp*, 2 Stockton, 206; S. C., 1 Stockton, 10; *Stuyvesant* v. *Woodruff*, 1 Zabriskie, 133; *Fetters* v. *Humphrey*, 3 E. Greene, 260, 265.) Volkening and those claiming under him are estopped by the covenants in his deed. (Greenleaf's Cruise on R. P., 611; *Jackson* v. *Stevens*, 13 Johns., 316; *Kellog* v. *Wood*, 4 Paige, 528; *Vanderhiden* v. *Crandall*, 2 Den., 9; S. C., affirmed, 1 N. Y., 496.)

H. R. Selden, for respondent. Plaintiff had a right to the maintenance of the drain as an easement. (Civil Code, art. 692; *Nicholas* v. *Chamberlain*, Cro. Jac., 121; *Sherry* v. *Pigot*, Palmer, 444; Popham, 166; *Palmer* v. *Fletcher*, 1 Lev., 122; *Pyer* v. *Carter*, 1 Hud. & Nor., 916; *Suffield* v. *Brown*, 9 Jurist's N. S., 999; *Ewart* v. *Cochrane*, 7 Jurist's N. S., 925; *Dodd* v. *Burchill*, 1 H. & Colb., 121; *Hall* v. *Lund*, 1 H. & Colb., 681; *Worthington* v. *Gimson*, 2 Ellis & Ellis, 618; *Polken* v. *Bastard*, 4 Barb. & Smith, 258; *Cary* v. *Daniels*, 8 Metc., 466; *Whitney* v. *Eames*, 11 Metc., 517; *Dunkler* v. *W. R. R. Co.*, 4 Foster, 489; *Lampman* v. *Milks*, 21 N. Y., 505; *Seymour* v. *Lewis*, 13 N. J., 489; Gale on Easements, 2d ed., p. 53.) The deed did not destroy the right; the drain was not an encumbrance. (*Dunkler* v. *W. R. R. Co.*, 4 Foster, 489; *Petter* v. *Hawes*, 12 Pick., 323; *Cary* v. *Daniels*, 8 Metc., 466; *Patterson* v. *Anthon*, 9 Watts, 154.)

RAPALLO, J. We have come to the conclusion, that the drain in controversy, did not constitute an *apparent* servitude or easement, and that consequently the case does not present the question so fully argued before us, whether when a dominant and servient tenement are owned by the same person, and he makes a conveyance of the servient tenement first, with covenants of warranty, and against encumbrances, and without the express reservation of any easement, such conveyance will preclude him or his assigns, from afterward asserting

in favor of the dominant tenement, which he retains, the benefit of the easement in the premises so conveyed. We therefore refrain from expressing an opinion upon that point.

All the authorities cited on the argument, by the learned counsel for the respective parties, concur in holding, that the rule of law which creates an easement on the severance of two tenements or heritages, by the sale of one of them, is confined to cases, where an *apparent sign* of servitude exists on the part of one of them in favor of the other; or as expressed in some of the authorities, *where the marks of the burden are open and visible.*

Unless therefore, the servitude be open and visible, or at least, unless there be some apparent mark or sign, which would indicate its existence to one reasonably familiar with the subject, on an inspection of the premises, the rule has no application.

There was nothing in the situation or appearance of the premises, to indicate that there was any drain from the privies in question. Drains are not a necessary accompaniment of privies constructed as these were. In cities, municipal regulations provide for their being cleansed by licensed public scavengers, and this practice is frequently brought to the notice of the inhabitants in a very obvious manner. No evidence was introduced to show that drains from them were usual in the locality in question. But had such evidence been given, it does not appear, that there was anything to indicate, that the privy of the neighboring house was drained through the lot sold to the defendant.

In the case of *Pyer* v. *Carter* (1 Hurl. & Nor., 916), which was much relied upon on the argument, and in the opinion of the learned court below, the dominant and servient tenement had originally been one house. This house had been divided into two parts. The drainage was of the water which fell upon the roof, and it may well be, that the situation and arrangement of the building were such as to indicate, that some drain necessarily existed as an appurtenent to the house, and that upon the division of the house into two parts, that

drain became common, and afforded drainage for both of the parts through one of them.

Such seems to have been the fact; for the court says, in rendering judgment, that "the defendant must have known, or ought to have known, that some drainage existed, and if he had inquired, would have known of this drain."

That decision recognizes the necessity of establishing, that the servitude is apparent, or that there is an apparent mark or sign of it, and seems to be based on the fact, that the situation and construction of the premises afforded such a sign.

In Washburn on Easements (2d ed., p. 68), the learned author, after reviewing the cases on this subject, states that he considers the doctrine of *Pyer* v. *Carter* confined to cases, where a drain is necessary to both houses, and the owner makes a common drain for both; and this arrangement is apparent and obvious to an observer.

If *Pyer* v. *Carter* goes further than that, or, at all events, if it applies to cases where there is no apparent mark or sign of the drain, it is not in accordance with the current of the authorities.

The bearing of that case upon the question, whether the alleged easement was one of necessity, upon the point as to the order in which the tenements were sold, and upon the other questions, which were argued before us with so much learning and ability, need not be now considered, as we do not propose at this time to decide those questions; and for the same reason, we forbear reviewing the numerous other authorities to which we have been referred, basing our decision upon the single ground, that the servitude claimed was not apparent.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment accordingly.

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HENRY RODERMUND, Respondent, *v.* JOSIAH G. CLARK, Appellant.

Where a party has an election between two inconsistent remedies, he is confined to that which he first chooses.

W. and defendant were joint owners of a sloop. Defendant, ignoring W.'s rights, sold the whole vessel to M. W., after the sale, took and retained possession. M. thereupon libeled the vessel, as owner, in the United States District Court. She was seized by the marshal, and M., having obtained judgment by default, she was delivered to him. W. assigned his interest, and also his claim against defendant, to plaintiff, who sues for conversion.

Held, that W., having elected to assert his rights, by retaining possession, and refusing to recognize the sale, he and his assignees were precluded from maintaining an action for the conversion.

(Argued June 22, 1871; decided November 10, 1871.)

APPEAL from judgment of the General Term of the second district, affirming a judgment entered in Orange county upon the report of a referee.

In December, 1862, the defendant Clark, was the sole owner of the sloop Boliver; and about that time he contracted to, and did sell, an undivided half of the vessel to John W. Ward for $1,500. Clark agreed to put Ward in possession in the spring of 1863. In the meantime the vessel was overhauled and repaired. In the month of May, 1863, Clark, pursuant to the contract of sale, delivered possession of the property to Ward as part owner and as captain. From that time until the winter of 1865–6, he had possession of the sloop, and navigated her for the joint benefit of himself and Clark.

During the winter of 1865–6 the vessel was laid up at Cornwall Landing in Orange county. On the 10th of February, 1866, Clark having previously advertised her for sale, sold the entire vessel at public auction. James F. Malcolm, of New York city, purchased her for $3,800. Ward forbade the sale of his half. The vessel could not be removed at that time, being inclosed in the ice. She remained there until the

opening of navigation in the spring of 1866, then Ward commenced to run her again. After making two trips with her, Malcolm commenced an action against him, to recover possession of the property, and the vessel was seized by the sheriff. Ward gave a counter bond and the vessel was re-delivered to him. Clark never gave Ward a bill of sale for his half; and so far as the records in the custom house showed, the title to the entire vessel was in Clark.

Afterwards Malcolm claiming the vessel under his purchase from Clark, libeled her as owner in the United States District Court, and she was seized by the marshal and taken from Ward. Malcolm obtained a judgment in that proceeding by default, and the marshal delivered the vessel to him. This default was afterwards opened, but Malcolm retained the vessel, and she never came back to the possession of either Ward or the plaintiff.

Ward having given the plaintiff an assignment of all his interest in the vessel, and of all causes of action against Clark for selling her.

The present suit was commenced against Clark to recover damages for such conversion.

The referee found, that the defendant was guilty of converting Ward's half of the vessel, because of the sale of the entire property to Malcolm, and ordered judgment for the value thereof with interest.

A. J. Parker, for appellant. Ward had the election to take possession of the vessel or to sue for conversion, having elected the former remedy he has lost the right to the latter. (*White* v. *Osborn*, 21 Wendell, 72, 76; *Blood* v. *Goodrich*, 9 Wendell, 71; *Morris* v. *Rexford*, 18 N. Y. R., 552.)

R. W. Peckham, Jr., for respondent. Defendant having sold the entire vessel, was liable to Ward or his assignee for converting the one-half. (*Nolan* v. *Colt*, 6 Hill, p. 461; *Forbes* v. *Shattuck*, 22 Barb., p. 568; *Benedict* v. *Howard*, 31 Barb., p. 569; 42 N. Y., 549.)

Opinion of the Court, per FOLGER, J.

FOLGER, J. It must be taken as one of the facts in this case, that there was an absolute sale, of one equal undivided half of the sloop, by the defendant to John W. Ward, and that Ward became the unconditional owner of that one-half. The referee has so found, and there is testimony to sustain the finding.

When then, the defendant afterward sold the whole of the sloop to Malcolm, ignoring the rights in her of Ward, his act authorized Ward to sue for a conversion of the property (*White* v. *Osborn*, 21 Wend., 72; *Dyckman* v. *Valiente*, 42 N. Y., 549); and this although the sloop was not put beyond the reach of Ward. (21 Wend., 72.)

Ward then had two courses, either of which he might pursue. He could sue the defendant for the conversion, or he could assert his right of possession, by keeping a permanent possession, or regaining possession if it was interrupted. (Id.) The effectually taking of either of these two courses, precluded him from taking the other.

If he actually insisted on keeping the possession of the vessel, and refusing to recognize the sale by the defendant, he could not sue the defendant for the conversion. There does not seem to be any doubt that he did so insist. At the time of the sale by the defendant to Malcolm, the sloop was fast in the ice, and in the actual possession as much of one tenant in common as of the other. As soon as she was free from the ice, Ward took actual possession of her, and continued it until legal proceedings were taken by Malcolm, for the delivery of the sloop to him. Ward still insisted upon the ownership of an interest in the sloop, and upon retaining the possession of her, by requiring a return of the possession of her to him by the sheriff. It is not perceived, how Malcolm could have obtained the possession of the sloop to the exclusion of Ward, if the last named had persisted in his defence to that action, and so had retained the possession, the right to which he had asserted. The defendant could pass to Malcolm no greater right in her than he had himself, and that was to an equal undivided half. So far Ward had elected his course and had

succeeded in it, and the proceedings of Malcolm had been ineffectual to dispossess him. Ward had taken his position. He had chosen to assert, and to act upon the assertion, that the defendant had no right to sell the whole of the sloop, and that his attempt to do so had not divested, and should not divest, the interest of Ward in her.

In our judgment he had then gone so far, as that he could not afterward entirely change his position, and that neither he nor the plaintiff, his assignee, recognizing the act of the defendant as having worked the destruction of his half of the sloop, could yield to the claim of Malcolm, asserted in the action in the United States court, submit to the seizure in the behalf of Malcolm of the vessel in that action, and then have a right of action against the defendant for the conversion.

The mode Ward had first chosen had, until then, been effectual to preserve to him his property and the possession of it. And when that was interfered with by Malcolm, in his suit in the United States court, it was the duty of Ward and the plaintiff not to abandon the property, but to persist in a defence of his right.

Where there exists an election between inconsistent remedies, the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone. (*Morris* v. *Rexford*, 18 N. Y., 552.) Any decisive act of the party, with knowledge of his rights and of the fact, determines his election in the case of conflicting and inconsistent remedies. (*Sanges* v. *Wood*, 9 Johns. Cas., 416; *Littlefield* v. *Brown*, 1 Wend., 398, affirmed, Ct. of Errors, 11 id., 467–470.)

The judgment of the court below should be reversed, with costs to the appellants.

ALLEN, GROVER, and ANDREWS, JJ., concur; PECKHAM and RAPALLO, JJ., dissent; Ch. J. not voting.

Judgment reversed.

WILKINS, Respondent, *v.* EARLE et al., Appellants.

Appeals to this court under section eleven of the Code, are confined to actual determinations of the various courts named, made at General Term. A judgment entered upon, and in conformity with a remittitur from this court, is not an actual determination of the court below. Its duty and power simply was to enforce the judgment of this court as prescribed in section twelve. The remittitur was equally controlling upon the General Term, and left nothing to be determined by it.

(Argued June 12th, 1871; decided November 10th, 1871.)

MOTION to dismiss appeal, upon the ground that the judgment appealed from was not an actual determination of a General Term.

(Papers and points not furnished reporter.)

RAPALLO, J. By section eleven of the Code, which defines the cases in which appeals will lie to this court, they are confined to *actual determinations* of the various courts named, made at General Terms thereof. (See also § 333, *Lake* v. *Gibson*, 2 Com., 188.)

The judgment appealed from in this case, was entered upon a remittitur from this court. No question is made, but that the judgment conforms to the remittitur. That remittitur controlled the court below, and a judgment in pursuance of it cannot be said to be an actual determination. The court below could not direct any different judgment. Its duty and power were simply to enforce the judgment of this court as prescribed in section twelve.

It can make no difference that the judgment on the remittitur was first entered at Special Term, and that judgment affirmed at General Term. The remittitur was equally controlling upon both branches of the court, and left nothing to be determined by either.

Did the right of appeal apply to every judgment of whatever character, as claimed, it is evident that a litigation could never be brought to an end

In this case, two questions were litigated in the court below. First, the defendants' liability, and secondly, the rule of damages.

Numerous exceptions were taken at the trial. A general verdict was rendered for the larger amount of damages, and the smaller amount, contended for by defendants, was liquidated by a special finding. The exceptions were heard in the first instance at General Term. A final judgment was there rendered in December, 1865, overruling the defendants' exceptions and refusing a new trial, but ordering judgment on the verdict for the smaller amount of damages in conformity with the special finding. From this judgment the defendants took no appeal.

If they desired to be in a condition, further to litigate the question of their liability or the correctness of the rulings at the trial, with a view to a new trial, it would seem that they should have appealed, lest they might be deemed concluded on those points, and confined to the single questions of the amount of damages, and thus be subjected to the damages first assessed by the jury, if, on the plaintiff's appeal, such damages should be adjudged to be recoverable as a legal consequence of the liability established against the defendants.

The plaintiff appealed from the judgment so far as related to the damages, but no appeal was taken by either party from that part of the order which refused a new trial.

On that appeal this court did not order a new trial, but reversed the judgment of the General Term and ordered judgment on the verdict for the larger amount.

On the argument of the plaintiff's appeal before the Commission of Appeals, the question arose whether the defendants could be heard, on the points relating to their liability and their exceptions taken at the trial. Some of the members of the court were of opinion that they could, and it does not appear unreasonable, that they should have been allowed to show, in answer to the plaintiff's claim to a more liberal rule of damages, that he had established no right of action, and therefore was not entitled to any damages, or that evidence

as to the damages claimed was improperly received or excluded.

But it is more questionable whether on the plaintiff's appeal, the defendants could have availed themselves of exceptions to other incidental rulings upon questions of evidence, or claimed a new trial by reason of such exceptions.

It is stated in the opposing affidavits, that the defendants were in fact heard upon all the points taken by them, but the decision of this motion cannot depend upon that fact. The question here is, whether the present appeal brings up for review any actual determination of the court below. If the defendants had a right to be heard upon all their points on the plaintiff's appeal to this court, and were here refused that right in whole or in part, the General Term could not correct that error, or for that reason refuse to obey the mandate of the appellate court. If they had no right so to be heard here, it was because they could only raise those points here by an appeal from the judgment of December, 1865. If they were in fact heard, as alleged, upon all their points and they were determined against them by the appellate court, they cannot, by the course now adopted, obtain a rehearing in this court. In neither case was any point presented for adjudication by the court below, on entering judgment on the remittitur. That judgment was in substance the judgment of this court, and I can find no ground on which an appeal from it can be entertained. The motion should be granted with costs.

All concur.

Appeal dismissed.

ROBERT P. PARROTT, Appellant, *v.* THE KNICKERBOCKER ICE COMPANY and THE NEW YORK ICE COMPANY, Respondents.

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A sailing vessel navigating a river, unless special circumstances exist making it dangerous, is entitled to take advantage of a favorable tide as well as of a wind; and in a temporary calm, or when the wind is baffling to keep in condition, to profit by any breeze which may spring up.

Under such circumstances, it is not required to anchor or take other measures to avoid collision with an approaching steamer. The steamer should calculate the course of the drifting vessel, by noting the course of the current, and should avoid it.

Interest upon the value of property lost or destroyed, by the wrongful or negligent act of defendant, is a proper item of damages.

(Argued September 6, 1871; decided November 10, 1871.)

APPEAL from an order of the General Term of the Superior Court of the city of New York, reversing a judgment in favor of the plaintiff, entered upon the report of a referee, and granting a new trial, on questions of fact as well as of law.

The action was brought to recover damages caused by a collision between the sloop Westchester, owned by the plaintiff, and the steam propeller Armenia, owned by the defendants. The collision occurred on the 14th of November, 1865, at about two o'clock A. M., in Haverstraw bay, on the Hudson river.

The sloop had left Cold Spring for New York on the afternoon of the 13th of November, laden with shot, shell and castings, and was proceeding southerly down the river, with an ebb tide. The steamer was ascending the river, having in tow four barges; one lashed to her starboard side, and three attached to a hawser about 200 feet long. The effect of the current was to set the barges to the eastward of the wake of the steamer.

The night was clear starlight; both vessels had their lights set, in accordance with the United States regulations. The river at the point of collision is about two and a half miles wide, the steamboat channel about a mile wide, from the

west shore to the middle ground. The collision occurred in the steamboat channel.

The bow of the steamer struck the sloop on her port bow, just forward of the chain plates, and she sank in a few minutes.

There was no lookout on the steamer, other than Delamater, the man at the wheel, in the pilot-house. The first pilot was in his berth, and it does not appear that any of the crew of the steamer were on deck, except the man at the wheel.

There were lookouts on the barges in tow, and there was a proper lookout on the forward deck of the sloop.

The man at the wheel of the steamer testified, that he saw the sloop approaching at the distance of a mile or a mile and a half; that he saw both her lights; that he was heading due north, and she bore a little to the eastward of him; that after that she appeared to stand more to the east, till she got within fifty yards, and then she sprang a luff and came across the bow of the steamer; that when she was within twenty-five or thirty yards he rang to slow and stop, and then the vessels collided; he did not ring to back.

The sloop was seen at the distance of about a mile by persons on the barges. Jacob Bogardus, a witness called by the defendant, who was on one of the barges in tow, testified that he saw the sloop coming, and said to his men that she was coming close, and sent word to the starboard barge of the hawser tier, to stand ready to sheer if the sloop came near; that when he first saw her, she was in a line with the port side of the steamer's smoke-stack; that as she drew near she appeared to work farther to the eastward; that he had his eyes on her all the time, because he did not know on which barge she would come. He also testified to her luffing when she got near, as did other witnesses on the barges.

There was no change in the course of the steamer, but at the time she stopped her engine she was on the same course which she had been keeping for half an hour previously.

The tide was running ebb at the rate of about two miles per hour. The steamer was making about one and a half miles per hour by the land.

Statement of case.

The principal conflict of evidence related to the wind. Those on board the sloop testified on the part of the plaintiff, to the effect that for one or two hours before the collision, there had been no wind, except occasional puffs of air from various directions, only enough to carry the boom from one side to the other, and except that, when off Haverstraw, about half an hour previous to the collision, the sloop had had a slight breeze for about ten minutes; that that breeze died away, and that from that time to the collision the sloop was drifting with the tide, heading down the channel and having no steerage way. That the crew of the sloop saw the steamer approaching at the distance of several miles, but paid little attention to her, until she was near and heading toward them, when they became apprehensive of a collision. That as the steamer approached, the crew of the sloop hallooed to the steamer, but there was no response, or apparent effort on the part of the steamer to clear the sloop. That when the vessels got within about 100 yards of each other, a little air drew off from the west, enough to shove the boom over, but not enough to give steerage way to the sloop; that when the steamer had approached to within forty or fifty feet of the sloop, she rang to slow and stop, and in a moment afterward struck the sloop; that up to the time of the collision the sloop had no steerage way, and the puff of wind last spoken of, was only sufficient to throw her boom over to the eastward, and her bow a little to the westward.

On the part of the defendants, evidence was given by various witnesses on the barges, and elsewhere, to the effect, that at the time of the collision, there was a good wind blowing from the north-west, and some of them testified that the sloop was going at the rate of six to eight miles an hour. There was also evidence of numerous witnesses, as to declarations of the master of the sloop, inconsistent with his testimony.

The referee found, that the collision was caused by the negligence of the defendants' employes, managing the steamer, without any fault or negligence on the part of the persons managing the sloop.

The plaintiffs damages were liquidated by stipulation, with the exception of the value of the sloop, and the question of interest, which were left to be determined by the referee.

The referee allowed interest on the damages, which consisted of the value of the vessel, less the value of hull and rigging saved, the value of cargo and freight lost, and the expenses of raising the hull and cargo saved. The value of the cargo saved far exceeded the cost of raising.

A. Smedbergh and A. J. Parker, for appellant. No vessel has a right to come in close proximity with another, and claim exemption, because the other commits a mistake. (*Austin* v. *N. J. Steamboat Co.*, decided in Court of Appeals November 22d, 1870, N. Y. Transcript, April 13th, 1871; *The Carroll*, 8 Wallace, 302.) The steamer had no proper lookout. (*The Ottawa*, 3 Wallace, 268, 272; *The Hypodame*, 6 Wallace, 219.) It was proper for the Westchester to drift. (*The Kentucky*, 4 Blatch., 325; *The Scioto*, Davies R., 359; S. C., 5 Legal Ob., 442; *Fritz* v. *Bull*, 12 How., U. S., 466; *Butterfield* v. *Boyd*, 4 Blatch., 356; *Sturgis* v. *Boyer*, 24 How., U. S., 110, 118, 120; *Pearce* v. *Page*, 24 How., U. S., 228, 231, 233; *The Ieland City*, 5 Blatch., 264; *Strout* v. *Foster*, 1 How., U. S., 89; *Steamship Fannie* v. *Schooner Ellen Forrester*, U. S. S. C., Daily Transcript, May 13th, 1871; *Crockett* v. *Newton*, 18 How., U. S., 581, 583; *Laune* v. *Tourne*, 9 La., 428; *Newton* v. *Stebbins*, 10 How., U. S., 586; *The Carolus*, 2 Curtis, 69; *The Globe*, 6 notes of cases, 275; 1 Parsons on Shipping and Admiralty, 571, 572.) If case is doubtful, referee's conclusions should not be reversed. (*Westerlo* v. *Dewitt*, 36 N. Y., 344, 345; *Everett* v. *H. R. R. Co.*, 24 How., 104.) Art. 20 of act of congress of 1864 violated, as there was no lookout. (*Beck* v. *S. R. T. Co.*, 6 Robt., 82, 92; *The Ottawa*, 3 Wal., 268; *The Hypodame*, 6 Wal., 216.) The referee was correct in allowing interest. (*The Mary Jane Vaughan* v. *The Telegraph*, 2 Benedict R., 47; *Watkinson* v. *Langdon*,

8 John. R., 213; *Klock* v. *Robinson*, 22 Wendell, 157; Sedgwick on Damages, 385; *The Baltimore*, 8 Wal., 385.)

T. B. Eldridge and S. Hand, for respondents. The order of General Term will be affirmed, if there is evidence upon which its views can be based. (Code, § 268; *Hoyt* v. *Thompson*, 19 N. Y., 207; *Beebe* v. *Mead*, 33 N Y., 587; *Coleman* v. *Second Avenue R. R. Co.*, 38 N. Y., 201.) If plaintiff's negligence contributed in any degree to injury, he cannot recover. (*Button* v. *H. R. R. Co.*, 18 N. Y. 248; *Kelsey* v. *Barney*, 12 N. Y., 425; *Grace* v. *Girdler*, 7 Wall., 196; *Dowell* v. *Steam Nav. Co.*, Ell. & Bl.; *Nelson* v. *Leland*, 22 How., 55; *Rathbun* v. *Payne*, 19 Wend., 398; *Strout* v. *Foster*, 1 How., U. S., 89; *The Indiana*, 1 Abb. Adm., 330; *The Potomac*, 8 Wall., 590; *The Champion*, 1 Abb. Ad., 202, 206, 207; *Neal* v. *Gilbert*, 23 Conn., 437.) He must prove affirmatively due care. (*Drew* v. *Chesapeake*, 2 Doug., 33; *Haldeman* v. *Beckwith*, 4 McLean, 286; *Ward* v. *Armstrong*, 14 Ill., 283) No lookout independent of pilot required. (*The Farragut*, 10 Wall., 334.) The presumption is, defendants were free from negligence. (1 Cowen & Hill's notes, 3d ed., 441; *Star* v. *Peck*, 1 Hill, 270, 273; *Butterfield* v. *Boyd*, 4 Blatchford, 356, 358.) Evidence so decided in favor of defendants, that decision of referee is not final. (*Adsit* v. *Wilson*, 7 How., 64, 66; *Jackson* v. *Steinburgh*, 1 Caine's, 163; *Conrad* v. *Williams*, 6 Hill, 444, 457; *Boyd* v. *Colt*, 21 How., 191; *Strong* v. *Place*, 33 How., 114.)

RAPALLO, J. The principal fact in controversy upon the trial was, whether at the time of the collision, the sloop was drifting down the river with the tide, as described by the plaintiff's witnesses, without wind sufficient to give her steerage way, or whether, as the defendants' witnesses testify, she was sailing with a good breeze, on a course which would have carried her to the eastward of the steamer, and when within a few yards' distance, voluntarily changed her course so as to throw herself athwart the bow of the steamer. It being stated

in the order appealed from, that the new trial was granted on questions of fact as well as of law, we have been compelled to examine the evidence with the view of determining, whether a new trial should have been granted on the ground that the findings of the referee were against the weight of the evidence.

If the collision occurred in the manner claimed by the defendant, the case is too clear for discussion. But if the plaintiff's version be the true one; if the sloop was becalmed and drifting with the tide, and the appearance of a change of course was produced, as stated by the plaintiff's witnesses, not by the action of the helm, but by a momentary puff of air, which threw her boom over to the eastward, and canted her bow to the westward, while she had no steerage-way, a more serious case is presented.

The referee has found this controverted fact in favor of the plaintiff. The court below, in giving the reasons for its decision, has not differed with his finding in respect to the circumstances of the collision; and after a careful examination of the testimony, we have come to the conclusion, that a finding in accordance with the plaintiff's version is not against the weight of the evidence.

Assuming then, as we must, that there was no wind, and the sloop was drifting with the current, we entertain no doubt as to the sufficiency of the evidence, to sustain the finding of negligence on the part of the defendants. From the circumstances of the collision, as testified to by the witnesses on the part of the plaintiff, the referee may have discredited the statement of Delamater, who was at the wheel of the steamer, and may have found, that he did not see the sloop in time to take measures to avoid her, or he may have found that, seeing her, Delamater omitted to change the course of the steamer, as he should have done. If there was any danger of the vessels coming together, it was the duty of the steamer to take action to avoid it; yet, although the sloop was seen by the men on the barges in tow at the distance of more than a mile, and one of the defendant's witnesses, who was on one

of the barges, testified that the sloop appeared to him to be coming close to the barges, and that he took measures to provide against her colliding with the barges, it is not shown that the steamer did anything whatever, for the purpose of keeping out of the way, until the vessels were within twenty-five or thirty yards of each other, when she rang to stop her engine. The man at the wheel testified, that the steamer was then on the same course which she had been keeping for half an hour previously. It is evident that if there was no wind, the sloop could not have moved materially out of the course in which she was drifting, and that a change should, therefore, have been made in the course of the steamer, so as to clear her.

The defence must, therefore, rest upon the allegation of contributory negligence on the part of the sloop.

As we have already stated, we do not deem the evidence on the part of the defence, in respect to the wind and the movements of the sloop, so preponderating as to justify us in holding that the referee should have found that the sloop had a wind, and wrongfully or negligently changed her course, and that his finding to the contrary was against the weight of the evidence. But it is claimed on the part of the defendants, that conceding that the sloop was drifting with the tide, and not under the control of her helm, it was negligent to suffer her to proceed in that unmanageable condition, and it was her duty to come to an anchor.

This position is sustained, by the opinion of the majority of the court below, and is stated as the ground upon which the new trial was granted.

We cannot concur in this view. It is not sustained by authority; and the adoption of such a rule would materially, and it seems to us, unnecessarily embarrass sailing vessels, especially in the navigation of rivers. A sailing vessel should, unless special circumstances exist rendering it dangerous, be entitled to take advantage of a favorable tide as well as wind; and in a temporary calm, or when the wind is baffling, to keep in condition, to take advantage of any breeze which may spring up. She should not be compelled, when a regular

current is carrying her toward her destination, to come to an anchor or lower her sails every time the wind slackens or fails.

If the current should be drifting her toward a stationary object, or one unable to keep out of her way, no doubt it would be her duty to anchor or take other measures to avoid collision. But in the navigation of a river, a sailing vessel owes no such duty to an approaching steamer to which she is visible, and which has motive power and sufficient room to enable her to keep clear. The steamer should judge of the course of the current of the river she is engaged in navigating, and by that means calculate the course of the drifting vessel and avoid it. (*Pearce* v. *Page*, 24 How. U. S., 228; *Newton* v. *Stebbins*, 10 How. U. S., 586; *Crockett* v. *Newton*, 18 How. U. S., 581; *Laune* v. *Tourne*, 9 La., O. S., 428; *The Island City*, 5 Blatchford, 264; *Frete* v. *Bull*, 12 How. U. S., 466; *The Fashion* v. *Ward*, 6 McLean, 152.) A steam propeller with a tow, stands upon the same footing in respect to the duty of avoiding sailing vessels, as any other steamer. (*N. Y. and Balt. Trans. Co.* v. *Phil. and Sav. St. Navigation Co.*, 22 Howard U. S., 461.)

No special circumstances were shown in this case, which rendered it improper for the Westchester to take advantage of the favorable current to make progress on her voyage, or to keep her sails up to catch the occasional breeze. The river was upward of two miles in width; the channel upwards of one mile in width, and almost entirely clear of vessels. And although it was night there was clear starlight, and the sloop had her lights set, in a manner to indicate that she was under way. It does not appear that there was any deficiency in her equipment. Her master and crew were on deck; she had a proper lookout, and the speed of the current did not exceed two miles per hour. At the rate at which both vessels were progressing, those navigating the steamer could with proper attention, have seen the sloop approaching for a considerable time before meeting her, and made their calculations as to her course, based upon the condition of wind and tide. There

was ample room, and the sloop had a right to expect that the steamer would pass her at a safe distance.

Assuming therefore, as we must, that the referee, in effect, determined that the collision occurred in the manner claimed by the plaintiff, and such finding not being against the weight of evidence, our conclusion is, that contributory negligence on the part of the plaintiff was not shown, and that the finding of the referee on that branch of the case should be sustained.

We have examined the various exceptions to rulings on questions of evidence, and do not find in them any sufficient ground for reversing the judgment.

The only remaining questions raised, relate to the damages. By the stipulation of the parties, but two items were left to be passed upon by the referee, viz., the value of the sloop, and interest. There was sufficient evidence to sustain his finding, as to the value of the vessel, and we think that interest on the value of the property lost was properly allowed. In cases of trover, replevin and trespass, interest on the value of property unlawfully taken, or converted, is allowed by way of damages, for the purpose of complete indemnity of the party injured, and it is difficult to see why, on the same principle, interest on the value of property lost or destroyed, by the wrongful or negligent act of another, may not be included in the damages. (*Propeller Mary Vaughan* v. *Steamboat Telegraph*, 2 Benedict, 47; Sedgwick on Damages, p. 385, and cases cited; *Walrath* v. *Redfield*, 18 N. Y., 457.)

The order appealed from should be reversed, and the judgment on the report of the referee affirmed with costs.

Ch. J., GROVER and PECKHAM, JJ., concur; ALLEN and FOLGER, JJ., not voting.

Judgment affirmed.

THE HOME LIFE INSURANCE COMPANY OF BROOKLYN, Appellant, *v.* SYLVESTER J. SHERMAN, Respondent.

Where a tenant yields the possession of the demised premises, in pursuance, or in consequence of a judgment for the recovery of possession, to the person adjudged to be the rightful owner of the paramount title, it is an eviction, and he is discharged from the payment of rent.

H., the owner of certain premises in New York, leased them to D., the lease contained a covenant, that the lessee should not use or allow any part of the demised premises, to be used for any business deemed by fire insurance companies extra hazardous. D. sublet a portion to the plaintiff, who sublet to defendant. All the leases contained similar covenants. Defendant commenced a business prohibited by the covenants in the leases. H. brought ejectment against D. and his sub-tenants, and obtained judgment. Defendant thereupon abandoned the premises, leaving the key with plaintiff.

Held, that this was in effect a surrender to H., and an eviction.

The rule that defendant was discharged thereby from the payment of rent was not changed by the fact, that the judgment in the ejectment suit was obtained, in consequence of defendant's violation of the covenants in his lease. Plaintiff's remedy is by action for breach of those covenants.

(Argued September 7th, 1871; decided November 10th, 1871.)

APPEAL from an order of the General Term of the second judicial department, reversing a judgment in favor of plaintiff entered in Kings county upon the report of a referee, and ordering a new trial at the circuit.

Samuel V. Hoffman, owner of premises 258, 259 and 260 Broadway, New York city, leased the same to Daniel Devlin for five years, from May 1st, 1864. This lease contained a covenant that the lessee "should not use the premises, or any part thereof, or allow them to be used, for any business which shall be deemed extra hazardous by the fire insurance companies of the city of New York, whereby the insurance will be affected." Devlin & Co., February 7, 1865, sub-let a portion of the premises to the plaintiff with a similar covenant, and on April 12, 1866, plaintiff sub-let the two upper lofts to defendant for three years from May 1st, 1866, with like covenants, for the sum of $4,500 per annum, payable quar-

terly. Defendant took possession of said lofts May 1, 1866, and immediately thereafter introduced the manufacturing of hoop skirts. In the latter part of May, 1866, Hoffman objected to the hoop skirt business, as a violation of the covenants in his lease. And efforts were made by plaintiff, to have this part of defendant's business removed from the building, but defendant refused to do so. Negotiations having failed, Hoffman brought ejectment against Devlin and all sub-tenants in October, 1866, alleging that the hoop skirt business of Sherman was a violation of his lease. Sherman answered. The action was referred, and judgment for plaintiff entered June 4, 1867. No execution ever issued upon said judgment, and Hoffman thereafter collected his rents from Devlin & Co. under his lease to them as before, and Devlin & Co. collected rents from plaintiff under their lease the same as before the judgment.

The defendant Sherman abandoned the premises leased to him in June, 1867, leaving the key with plaintiff. This action is for the quarter's rent due August 1st, 1867.

The action was referred, and upon the referee's report judgment was entered in favor of the plaintiff for $1,599.46, October 31st, 1868.

A. B. Capwell, for appellant. There was no eviction. (*Vernam* v. *Smith*, 15 N. Y., 332; *Kerr* v. *Shaw*, 13 Johns., 236; *Waldron* v. *McCarty*, 3 Johns., 464; *Kortz* v. *Carpenter*, 5 Johns., 120; *Fowler* v. *Paling*, 6 Barb., 171; *Webb* v. *Alexander*, 7 Wend., 283; *Whitbeck* v. *Cook*, 15 Johns., 490; *Hunt* v. *Amidon*, 4 Hill, 345; *Chamberlain* v. *Graves*, 2 Hill, 504.)

Geo. G. Reynolds, for respondent. Defendant removed from the premises by compulsion of law. (*The U. Co.* v. *Inhabitants of A.*, 17 Mass., 460; *Hanson* v. *Buckner's Executors*, 4 Dana, 251, 254; *Preston* v. *Borton*, 12 Pick., 7.) The judgment in ejectment was an eviction by title paramount and discharged liability for rent. (*Dyett* v. *Pendle-*

ton, 8 Cow., 727, 730; *Simers* v. *Salters*, 3 Denio, 214; *Greenvault* v. *Davis*, 4 Hill, 643; *St. John* v. *Palmer*, 5 Hill, 599; *Hunt* v. *Amidon*, 4 Hill, 345, Ct. of Errors; *Leach* v. *Bailey*, Ct. of Appeals, 1857, cited in *Curtis* v. *Bush*, 39 Barb., 664.)

CHURCH, Ch. J. The first question is, whether there was an eviction of the defendant from the demised premises, by the owner of the paramount title.

To constitute an eviction the tenant must be disturbed in his possession, and in pleading an eviction, an *ouster* must be alleged. (*Vernam* v. *Smith*, 15 N. Y., 332; *Kerr* v. *Shaw*, 13 Johns., 236; *Waldron* v. *McCarthy*, 3 id., 471.) But there are a variety of circumstances, which are deemed such a disturbance of possession as to constitute an eviction, short of physical force or legal process. It has been held that any interference, on the part of the landlord, which impairs the beneficial enjoyment of the premises, such as the creation of a nuisance in another portion of the same building, or the like, is a sufficient disturbance of possession to constitute an eviction. (20 N. Y., 281; *Dyett* v. *Pendleton*, 8 Cow., 727, and cases there cited.)

But the tenant must quit possession in consequence of such interference. (Id.) So the eviction need not be by process of law, provided the tenant yields the possession to the person adjudged to be the rightful owner; or if such owner (the premises being vacant) enters into possession. (*St. John* v. *Palmer*, 5 Hill, 599.) So, if a tenant of the mortgagor, upon foreclosure and sale of the premises, abandons the possession to the purchaser, it is deemed an eviction by one having paramount title, and the tenant is not liable for rent (*Simers* v. *Saltus*, 3 Denio, 214); and it was held in this case that he was not obliged to remain in possession, and pay rent to the purchaser to whom the lease had been assigned, and who offered to continue it to the end of the term. A judgment alone is not sufficient; the possession must be disturbed or yielded.

But if the tenant yields the possession, in pursuance of a judgment for the recovery of possession, or in consequence of it, to the person adjudged to be the rightful owner of the paramount title, it is an eviction. (*Fowler* v. *Poling*, 6 Barb., 165, and cases before cited.)

This distinction will reconcile the authorities, which otherwise may seem conflicting. The rule to be gathered from all the authorities, and which accords with good sense, is that a person cannot remain in possession of premises, and still claim that he has been turned out; nor, when a judgment of a competent court has determined, that he shall deliver possession to a particular person, need he wait to be forcibly ejected. He can acquiesce in the judgment of the court, and voluntarily obey its mandate.

In this case, the judgment obtained by Hoffman was, that he recover possession of the premises, "and that said defendants deliver the possession of the said premises to the plaintiff, and that he have execution therefor."

The defendant had a right to comply with the requirement of the judgment, without waiting for the execution. An eviction by title paramount, before the rent falls due, discharges the tenant from the payment of rent. The obligation ceases when the consideration for it ceases, which is, the enjoyment of the land. (1 Kent's Com., 464.)

But the referee finds, that the defendant did not surrender the possession to Hoffman, the plaintiff in the judgment in ejectment; and it is urged that he cannot, therefore, claim the benefit of the rule referred to. It is undisputed that he abandoned the premises and delivered the keys to the plaintiffs in this action, who were his lessors, and who were also parties defendant to the action in ejectment, and bound by the judgment.

If the defendant had delivered the keys to a stranger, having or claiming an interest not subordinate to the judgment, there might have been force in this objection; but the plaintiffs cannot object on this ground. They could have delivered the keys to Hoffman, in accordance with the judgment, as

they were legally bound to do; and if they elected not to do so, it was their fault, for which defendant is not responsible.

It appears that the judgment was obtained, on account of the business of the defendant of manufacturing hoop skirts, which was a violation of a covenant in the lease from Hoffman to Devlin & Co., that no business which was deemed by the insurance companies to be extra hazardous, should be carried on in any part of the premises; and when the defendant removed that business, neither Hoffman nor the plaintiffs intended or desired to change their relations to the property; and they did not, as the latter continued to pay rent as before. It is manifest that this was understood by the defendant and all the other parties, and it is presumed that the keys were delivered to the plaintiffs with that understanding. But, upon technical grounds, it may well be doubted whether the abandonment of possession, in pursuance of the judgment, did not operate to transfer the seizin to Hoffman, and put him in constructive possession of the premises. (5 Hill, *supra.*)

It is also claimed that the judgment in favor of Hoffman, having been obtained by reason of the business carried on by the defendant, and which was a violation of the covenants in the original lease from Hoffman to Devlin & Co., and also of the covenants in the lease from the plaintiffs to the defendant, he cannot take advantage of his own wrong, and thus relieve himself from the payment of rent. While this position is plausible, I do not think it is tenable. The judgment by Hoffman was by virtue of the forfeiture, for a violation of the covenants in the lease from him to Devlin & Co. The rights of the parties in this action, under the lease executed by them, were not and could not be litigated in that action. If the plaintiffs had expressly stipulated, that the defendant might carry on the hoop skirt business, the result of Hoffman's action would have been in no degree affected. If the defendant has violated the covenants in his lease, the plaintiffs are not remediless, but can maintain an action for such violation, and recover such damages as they have suffered, which may or may not be equal to the rent; but they cannot

maintain an action for the rent. As we have seen, the circumstances amount to an eviction of the defendant, and the rent is extinguished, but this does not shield him from liability for a violation of his other covenants.

These views render it unnecessary to review the question of fact, whether the plaintiffs consented to or requested the abandonment of the premises by the defendant.

The order granting a new trial must be affirmed, and judgment absolute ordered for the defendant.

All concur.

Judgment affirmed.

THE PEOPLE ex rel. ARMSTEAD C. HENRY and others, Commissioners, etc., Respondents, *v.* JAMES NOSTRAND, Supervisor, etc., Appellant.

Upon an order to show cause why a peremptory writ of mandamus should not issue, which order contains the usual clause, "or for other relief," the Supreme Court has power to grant a peremptory writ of mandamus, for any relief to which relator is entitled, although not specified in the order.

The mandatory part of the writ need only describe the thing to be done with reasonable certainty, so that defendant will know what is required of him.

Under the provisions of chapter 905 of the Laws of 1869 (authorizing the construction of a highway in the towns of Jamaica and Newtown, in the county of Queens), as amended by chapter 750 of the Laws of 1870, the supervisor of the town of Jamaica is required to pay over the moneys raised for the purposes of the act to the commissioners therein appointed.

The position of commissioner under that act is an office, and under section 1 of article 10 of the State Constitution, it is vacated by the acceptance of the office of sheriff by one of the commissioners.

When a person sets up a title to property by virtue of an office, and comes into court to recover it, he must be an officer *de jure*, as well as *de facto*, particularly where he acts against the express mandate of the Constitution in holding the office.

Under said act, where the office of one of the commissioners is thus made vacant by his acceptance of the office of sheriff, the other two commis-

Statement of case.

sioners have no power to act while the vacancy exists; and the fact of the vacancy is a justification to said supervisor, in refusing to pay over the moneys collected.

The granting of a writ of mandamus, therefore, to compel such payment, is error.

(Argued September 12, 1871; decided November 10, 1871.)

APPEAL from the order of the General Term of the second judicial department, affirming an order directing a mandamus to issue requiring the defendant "to pay over to the relators, as commissioners, to lay out and construct a public road or highway in the towns of Jamaica and Newtown, the moneys raised by tax in the town of Jamaica, under chapter 750, Laws of 1870 of the State of New York, for the construction of said road, and which have been paid over to him, said supervisor."

The relators, at the time of making the demand, required the supervisor to pay to them the sum of $30,000, which was refused, upon the ground that the law did not give him authority to pay it over.

A tax of $30,000 had been imposed; and between $26,000 and $27,000 had been collected and paid over to defendant.

At the general election held in November, 1870, Armstead C. Henry, one of the commissioners, was elected sheriff of Queens county, and had accepted and entered upon the duties of the office.

No opinion was written either at Special or General Term.

J. H. Bergen, for appellant. Relators must show a clear legal right to the thing sought. (*People* v. *Booth*, 49 Barb., 31; *People* v. *Contracting Board*, 27 N. Y., 378.) If the relators ask too much, defendant entitled to judgment. (*People* v. *Supervisors of D.*, 1 Hill, 50; *People* v. *Supervisors of W.*, 12 Barb., 446; *People* v. *Barker*, 35 Barb., 105; *People* v. *Board of Supervisors*, 10 Barb., 233; S. C., affirmed on appeal, 21 How., 288.) There was no legal board of commissioners. (Constitution, art. 10, § 1; Bouvier's Law Dic., Title "Office"; *Henly* v. *Mayor of Lynn*, 5 Burg.,

9; Bacon's Abridg., Title Office, 20 Wend., 595; *People* v. *Hayes*, 7 How., 248; Laws 1869, ch. 905, § 1; 3 R. S., 5th ed., p. 869, § 29; *Keeler* v. *Frost*, 22 Barb., 401.)

S. Hand, for respondents. The commissioners are not officers. (*Sheboygan Co.* v. *Parker*, 3 Wall., 93.) The title to office cannot be inquired into collaterally. (*People* v. *White*, 24 Wend., 539; *People* v. *Hopson*, 1 Den., 597.)

CHURCH, Ch. J. It is objected that the order granting a peremptory mandamus should be reversed, because the mandatory part of the order varies from that of the order to show cause. The latter was an order to show cause, why a peremptory mandamus should not issue to compel the appellant to pay over $30,000 to the relators; the whole amount of the tax assessed upon the town of Jamaica, which it was alleged had been collected and paid over to the appellant, while the former required the payment of what actually had been collected and paid to him.

This court held in *The People* v. *The Supervisors of Delaware County*, that when proceedings for a mandamus are commenced, by an order to show cause why the defendant should not do a certain thing, the clause, "or for other relief," gave the court power to grant the writ for any relief to which the party was entitled, although the relief granted might not be the same as that specified in the order to show cause.

The court would, of course, exercise a sound discretion, and would deny the writ altogether, if it appeared that the relator was not entitled to the thing demanded, but was entitled to something which the defendant was willing to perform. In this case $30,000 was demanded. The appellant denies that he has received the whole of that amount, and alleges he has received not over about $27,000, but refused to pay the relators anything, claiming that they were not legally entitled to it.

In such a case the court had power, and it was proper to pass upon the point made by the defendant; and if that was

decided against him, to modify the writ so as to require him, to pay over the amount which he admitted he had in his hands. It is unnecessary to determine, whether this course would have been upheld if an alternative writ had first been issued, and the case heard upon an issue of law or fact joined upon the return.

It was also urged upon the argument that the order should be reversed, because the precise amount is not specified in the peremptory writ. This position is not tenable. All that is necessary is that the thing to be done should be described with reasonable certainty, with such certainty that defendant will know what is required of him. This rule is peculiarly applicable to public officers, who are commanded to perform a public duty, and especially where the facts constituting the act are within their personal knowledge.

Assuming that it was the duty of the appellant to pay over the whole $30,000, or so much thereof as he had received, when called upon for the whole, he answers, substantially, "I have only received about $27,000, but I refuse to pay over anything," on the ground that the persons demanding it are not entitled to receive it.

The court decided that these persons were entitled to receive it, and commanded the appellant to pay over what he had received. There is neither uncertainty nor injustice in this requirement. He knew how much he had received, and if he paid that sum he would be protected; if not, an attachment would rightfully issue against him. His duty was adjudged to be, to pay the money to the persons claiming it, and that duty was sufficiently defined in requiring him to pay all that he had received.

If he desired in good faith to comply with the writ, but was unable to do so from the uncertainty of the mandate, the court would doubtless relieve him; but in this case there was no room for doubt. The act to be performed was specifically described, and there is no pretence that the appellant did not know what was required, or that he was unable to perform it.

The authorities cited have no bearing upon this point. The leading case is *The People* v. *Supervisors of Dutchess* (1 Hill, 50), which was heard upon a return to an alternative writ, requiring the respondents to show cause why they should not be compelled to do two things. The court held that the relators were entitled to one and not the other, and rendered judgment for the defendants, holding that the requirement was an entirety, and must be sustained as such or fail, although the court intimated that there might be exceptions to that rule. But the question of the certainty of the mandate was not involved.

The other cases cited are of the same character, and do not relate to this point. The authorities, as well as general principles, are the other way. *Commonwealth* v. *Councils of Pittsburg* (34 Penn., 514) was a case heard upon a return to an alternative mandamus, requiring the respondents to raise the money by tax to pay the interest upon certain bonds. It was objected that the writ did not mention the amount of the interest due or the amount for which provision was to be made. The court overruled the objection and said: "It is, however, in this respect sufficiently certain. It describes the bonds, their dates and amounts. They are bonds of the city of Pittsburg. From the necessity of the case the amount of the unpaid interest must be known to the obligors. The extent of their duty is, therefore, defined."

In the case of *The Queen* v. *Com. of Southampton* (1 B. & S., 5), the respondents were required to take the necessary and legal "measures and proceedings for obtaining and recovering" of the Southampton Dock Company certain moneys, which it was alleged that company were bound to pay, and of which the relators, the mayor, etc., of Southampton, were entitled to a portion.

It was objected that it was not specified what legal measures the respondents were required to take, and it was conceded that if the construction of the writ was, that an action was to be brought, it could not stand; but the objection was overruled. CROMPTON, J., said: "But the only point necessary

for us to determine, is whether the mandatory part of this writ is good. Now, I have always understood that in the law of mandamus, the rule is that the mandatory part of the writ may be very general, but that the return must, on the contrary, be very minute in showing the party did not do what he was commanded." The court decides, that as the mandatory part of the writ did not necessarily require an action to be brought, the writ should stand.

These and other authorities establish, that it is sufficient to inform public officers in a general way what their duty is, and to command its performance, unless they can justify or excuse the neglect. They cannot shield themselves behind technical objections to the descriptive part of the act to be done. The appellant in this case, it is just to say, did not attempt to do so, but relied upon the objection that the relators were not legally entitled to receive the money. But if this objection was valid, the court could modify the writ in this respect. (*People* v. *Sup'rs of Delaware, supra.*)

The most serious obstacle to the success of the relators, is the question as to their legal right to demand and receive this money, and the duty of the appellant to pay it to them. This is questioned upon two grounds. First, that the amended act of 1870 does not, in terms, require the defendant to pay the money to the commissioners. The original act of 1869 contained this express provision, as to moneys to be raised in Jamaica and in the town of Newtown; but the eighth section of that act was amended, so as to provide for raising money in Newtown by issuing and delivering bonds to the commissioners, while the proportionate share of the expense of Jamaica was to be raised as provided in the act of 1869, by taxation. Although the express provision to pay the money so to be raised to the commissioners is omitted in the act of 1870, the implication that this is to be done is manifest, from the general scope of the whole act, and from the express directions for them to use the money in a particular manner. The objects of the act could not be carried out unless the money was paid to them, and we think they were entitled to

receive it from the supervisor of the town. The second ground relied upon by the appellant, is that one of the commissioners had vacated the office, and that the other two had no right to act until the vacancy was filled. It appears that one of the commissioners, before the demand for this money was made, had been elected to and had accepted the office of sheriff of the county. Section 1 of art. 10 of the Constitution provides, that sheriffs shall hold no other office.

It is a settled rule, that the acceptance of an incompatible office, operates as a resignation of the incumbent of the office then held by him. (*People* v. *Carrique*, 2 Hill, 93, and cases there cited.) The constitutional provision above referred to makes the office not only incompatible, but expressly declares that sheriffs shall hold no other office. If, therefore, the position of commissioner, under the act in question, is an *office*, the relator, Henry, vacated it by accepting the office of sheriff. I have no doubt that it is an office. It is a public employment, for which the incumbent receives compensation. The duties to be discharged were of a public character. The commissioners were authorized to exercise a portion of the functions of government; they were intrusted with the power of taking private property for public use, by right of *eminent domain*, and authorized to receive and expend a large amount of money in the construction of a public improvement; and they possessed every attribute and characteristic of public officers, and come within every accepted definition.

"Office" is defined to be "a right to exercise a public function or employment, and to take the fees and emoluments belonging to it." (Bouvier, Title Office.) "The idea of an *officer* clearly embraces the idea of tenure, duration, fees or emoluments, rights and powers, as well as that of duty; a public station or employment; an employment confirmed by appointment of government." (Burrill's Dic., Title Office.) PLATT, J., in 20 J. R., 493, defined office to be "an employment on behalf of the government in any station or public trust, not merely transient, occasional or incidental." What

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Mr. Henry was, therefore, not a commissioner, and had no more right to act in that office than any other citizen, and his want of title is available in this proceeding.

He is seeking in this proceeding, to recover possession of this money by virtue of an office which he does not hold. The only remaining question is, whether the other two commissioners could act while the vacancy existed? I think not. The statute appointing them confers the power upon three, and provides that whenever the number of commissioners is reduced below three the vacancy shall be filled by the county judge. It is quite evident that the legislature intended to intrust the powers conferred to three persons, and that the judgment of that number should be requisite to the discharge of their duties. I am not aware of any principle, which enables two persons to discharge a public duty expressly devolved upon three without consultation with the third. At common-law two could act in such a case, but it was indispensable that the three should meet and deliberate upon the subject. (*Crocker* v. *Crane*, 21 Wend., 211; 7 Cow., 526, note *a*; 22 Barb., 400.) And this rule of the common-law has been confirmed and adopted by statute. (2 R. S., 555, § 27.) A majority may perform the duty after all have met and deliberated, but two cannot do this when the office of the third is vacant any more than they could if the third had not met or been consulted. The power was delegated to three persons, not to their survivors or to a majority, and provision was made to fill vacancies, so that three should at all times be in office. If two could act as survivors, why not one? No authority was cited on this point, but upon general principles, and the reason of the thing, it seems quite clear, that the two commissioners had no power to do any official act.

A somewhat analogous principle was decided in the case of the *Queen* v. *Wake* (92 C. L. R., 384), in which it was held that when one of two persons, appointed under a statute to execute jointly the office of clerk to a county court died, the survivor continued to hold the office, though he could not act, until a successor to the deceased person had been appointed.

The defendant was justified in withholding the money from the relators, because they had no legal right to demand it. He was a public officer and could keep the money, until it was claimed by officers lawfully entitled to act as such, and upon this ground the order must be reversed.

All concur.

Order reversed.

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EZRA W. ACER, Respondent, *v.* DANIEL P. WESTCOTT, impleaded with others, Appellants.

A recital in a deed, forming a link in the chain of title of any facts, which should put a subsequent grantee or mortgagee upon inquiry, and cause him to examine other matters, by which a defect in the title would be disclosed, is constructive notice of such defect. But the basis of this rule is negligence, and it is only applicable to cases, where the purchaser or encumbrancer is chargeable with gross negligence in not making the examination.

The recital in a deed was in substance, that it was made in pursuance of a contract with A., of whom the grantee was assignee, and as such entitled to the conveyance.

Held, that the legal inference from the facts stated was in support of the title, and there was nothing therein imposing upon a *bona fide* mortgagee, the duty of examining the contract or assignment, for the purpose of ascertaining if there were latent defects in the title, or latent equities in favor of the assignor.

(Argued September 8th, 1871; decided November 10th, 1871.)

APPEAL from a judgment of the General Term of the seventh judicial district, affirming a judgment entered in Monroe county in favor of plaintiff upon the report of a referee. (Reported below in 1 Lansing, 193.)

Prior to the 29th of January, 1864, Mrs. Charlotte H. Brown was the owner in fee of lots 55, 56, 57, 58, and 59, on the east side of Magne street, in the city of Rochester.

On that day, she, by written contract, agreed to convey all those premises, except thirty-three feet off of lot 55, to Ezra

W. Acer, the plaintiff herein, upon the payment by him of the sum of $1,200.

Acer was the owner in fee of lot No. 1 in the Whitney tract.

Prior to the 24th day of April, 1867, Acer had made such payments upon this contract, that there remained due only the sum of $550; and on that day he entered into a written contract with George G. Curtis, one of the defendants, to convey to him the premises described in Mrs. Brown's contract, and also lot No. 1, for the sum of $5,000, to be paid by Curtis, in part, by conveying to Acer other land, giving to Mrs. Brown a first mortgage to secure the sum due to her on Acer's contract, viz., $550; and giving to Acer a mortgage on the same premises of $3,380.20.

Acer had been negotiating with Mrs. Brown for the residue of lot 55. Curtis desired to obtain it; and after making the contract of April 24th, Acer and Curtis desired to make an arrangement with Mrs. Brown, by which she would execute a deed to Curtis instead of Acer, and take his bond and mortgage for the unpaid purchase-money remaining on Acer's contract.

In pursuance of their wishes she agreed to sell to Curtis the residue of lot 55 for $325, and include that with the land mentioned in her contract with Acer, in one deed, running directly to Curtis.

Accordingly, on the 3d day of June, 1867, she did, by deed dated on that day, for a consideration (as therein recited) of $1,550, convey to Curtis the premises embraced in the contract with Acer, and also the residue of lot 55.

The deed contains the usual covenants of warranty for quiet possession, and the following recital: "This conveyance is made in pursuance of a contract of sale of said premises made and entered into by the party of the first part, for a conveyance thereof to one Ezra W. Acer, of whom the said party of the second part has become the assignee or purchaser; and as such entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated January 29th, 1864."

It was placed by her in the hands of her agent, Mr. Crittenden, through whom the arrangement for it had been made by Acer and Curtis.

On the 5th of June, 1867, Curtis called on Crittenden, requested the delivery of the deed; and in response to Mr. Crittenden's inquiry, as to whether he (Crittenden) was authorized to deliver it under the agreement between him (Curtis) and Acer, was answered by Curtis that it was all right.

Crittenden thereupon delivered the deed to Curtis, and Curtis paid him $881.50 ($600 in money and his bond secured by mortgage for $281.50), that being the balance of $550 due on the Brown and Acer contract, and the price of the residue of lot 55.

On the same day the deed was placed on record, and Curtis executed to defendant, Wescott, a mortgage upon all the premises described in the deed from Mrs. Brown, as security for the payment of $6,000.

This sum was made up in part of a precedent indebtedness from Curtis to Acer, and in part of a present consideration as follows: Precedent debt, $3,700; present consideration, $2,850. Curtis was in possession when he received the deed from Mrs. Brown, and when he gave the mortgage.

The referee found, "that said Wescott was in no way privy to, nor had he any notice or knowledge of any fraud in regard to any of the matters aforesaid, on the part of said Curtis; and he received said mortgage to himself, without any intent or purpose, on the part of said Wescott, to defraud this plaintiff, nor had he any notice of the plaintiff's rights, except such as he may be charged with by the recital in the said deed from Mrs. Brown to Curtis."

And, as conclusions of law, he held:

1. "That Acer was entitled to receive from Curtis a mortgage of $3,380.20 upon the Magne street lots, second only to a mortgage to Mrs. Brown of $550."

2. "That, by the recital in the deed from Brown to Curtis, Wescott was chargeable with notice of Acer's right to such mortgage;" and,

Statement of case.

3. "That Acer should have a lien on such premises for $3,280.20 prior to Wescott's, and that the mortgage of the latter should be postponed thereto."

G. F. Danforth, for appellant. Plaintiff must recover on case made by complaint. (*Field* v. *Mayor*, 6 N. Y., 179; *Wright* v. *Delafield*, 25 id., 270.) Fraud was not proved, and plaintiff not entitled to the relief granted. (*Wilde* v. *Gilson*, 1 H. of L. Cases, 605, 622.) The recital in the deed was no notice to Wescott of Acer's equities. (*Earl of Montague* v. *Preston*, 2 Vent., 170; *Hyatt et al.* v. *Phifer*, S. C. of North Carolina; *Johnson* v. *Crane*, 40 Barb., 78; 13 Ves., 120; Mod. Ch., 327; Newland, 511; *Bonner* v. *Ware*, 10 Ohio, 465; *Bell* v. *Duncan*, 11 id., 192; *Brush* v. *Ware*, 15 Pet., 94; *Lessee of Buckhart et al.* v. *Bucher*, 2 Binn., 455; *Scott* v. *Evans*, 1 McLean, 486; *Morse* v. *Hunter*, 1 Gilm., 317; *Gilbert* v. *Petiter*, 38 Barb., 572; S. C., 38 N. Y., 165; *Jones* v. *Smith*, 1 Hare, 43; S. C., 1 Phill., 244.) Purchaser not bound to go elsewhere to ascertain if recital is false. (*Frost* v. *Beekman*, 1 Johns. Ch., 288; S. C., on appeal, 18 Johns., 544; *Peck* v. *Mallam*, 10 N. Y., 509; *Johnson* v. *Crane*, 40 Barb., 78–88; 2 Mason C. C., 531; *Curtis* v. *Root*, 28 Ill., 376.) The question involved is one of good faith. Gross or culpable negligence must be shown. (*Dey* v. *Dunham*, 2 Johns. Ch., 182; *Jackson* v. *Burgott*, 10 Johns., 457; *Jackson* v. *Van Volkenburgh*, 6 Cow., 260; *Fraser* v. *Western*, 1 Barb. Ch., 220; *Brown* v. *Blydenburgh*, 7 N. Y., 141; *Williamson* v. *Brown*, 15 id., 354; *Ware* v. *Egmont*, 31 E. L. & Eq., 87.) Acer was guilty of negligence in not disclosing his equities, and must take the consequences. (1 McN. & G., 446; *Deane* v. *Hale*, 3 Russ., 11, 14, 21; *Rice* v. *Rice*, 2 Drew. Ch., 73; *Hewitt* v. *Loosemore*, 9 Hare, 449; *Dowle* v. *Saunders*, 2 H. & M., 242; *Colyer* v. *Finch*, 5 H. L. C., 905; *Perry, Herrick* v. *Atwood*, 2 De G. & J., 21; *Layard* v. *Maud*, 4 L. R. Eq. Cas., 397, 404.) Defendant improperly charged with costs. (*Murray* v. *Ballou & Hunt*, 1 Johns. Ch., 565–581; *Murray* v. *Lylburn*, 2 id., 441.)

W. F. Cogswell, for respondent. Recital in deed constructive notice to defendant. (*Earl of Montague* v. *Preston*, 2 Vent., 170; *Reeder* v. *Barr*, 4 Ohio; *Howard Ins. Co.* v. *Halsey*, 4 Seld., 271, 274.)

PECKHAM, J. There is but one question in this case. Was the recital in the deed from William Brown to Curtis, notice to the defendant of the equitable rights of the plaintiff in the premises conveyed? If it were, then the defendant was not, in law, and could not be a *bona fide* purchaser. If it were not, he could be, and was a *bona fide* purchaser to the extent of the money advanced to Curtis in the mortgage. There was some evidence in the case as to other notice to defendant of plaintiff's rights. But the referee directly negatives every other notice, and distinctly finds the defendant free from all fraud, and that he had not "any notice of the plaintiff's rights, except such as he may be charged with by the recital" in the deed.

The recital is as follows: "This conveyance is made in pursuance of a contract of sale of said premises, made and entered into by the party of the first part for the conveyance thereof to one Ezra W. Acer, of whom the said party of the second part has become the assignee or purchaser, and as such entitled to a fulfillment thereof, by virtue of this conveyance; said contract being dated January 29th, 1864."

It is insisted that this was constructive notice to the defendant of the plaintiff's equities in the property. That having this notice, he was bound to have examined that contract and its assignment to the defendant, and thus he would have ascertained the equities of the plaintiff. Constructive notice may be said to be a knowledge by the purchaser of some facts which should put him upon inquiry, and require him to examine other matters that would generally unfold the true title.

If he omit to make the examination in a proper case, he is conclusively charged with negligence, and with notice of the defect in the title. (1 Story's Eq., 399, and cases cited.) But

if he exercised due diligence and fail to discover the defect, the presumption of negligence is rebutted, and he is regarded as a *bona fide* purchaser. (*Williamson* v. *Brown*, 15 N. Y., 354.) It may well be that the defendant in this case used such diligence. I do not propose to discuss it. The case was not disposed of upon that ground. The findings make these parties equally innocent. Upon whom, then, does the law cast the loss?

The referee imposes it upon the defendant, upon the ground chiefly, that though the recital was good evidence as against Mrs. Brown, the vendor, it was none as against Acer; and, hence, as the defendant is presumed to know the law, he should not, and could not, rely upon it as to him. The referee was right as to the law that the recital would not legally bind Acer, as he claimed, prior to the deed. (*Penrose* v. *Griffith*, 4 Binn., 231.) But that is not the precise principle upon which this doctrine of constructive notice rests. The referee made it a question of evidence, rather than of notice. The whole basis of the rule is negligence in the purchaser. It is a question of good faith in him, not of strict legal right.

Has the purchaser been guilty of such negligence, in not seeing this contract, as would justly cast an imputation of fraud upon him by the omission? Was this omission what the law terms "*crassa negligentia*"? These are the proper points of inquiry in a case like this. (*Moore* v. *Boddan*, 2 cases in C. of S., 501; *Jones* v. *Smith*, 1 Hare., 43; same case on appeal before Lord Chancellor LYNDHURST, 1 Phillips, 244; *Ware* v. *Egmont*, 31 Eng. L. & Eq., 89, 97.) In the last case Lord Ch. CRAMWORTH observed: "The question, where it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining, and might, by peculiar caution, have obtained the knowledge in question, but whether the not obtaining it was an act of gross or culpable negligence." (See also *Hiern* v. *Mill*, 13 Vesey, 120.) In the case at bar, when the deed was given, the contract is legally supposed to be executed, is fulfilled. The contract is not recorded; and in searching the title, the legal title, it is

not a paper necessarily to be found or referred to. It would be fair to infer, ordinarily, that a grantor who had given such a contract, and then executes a deed to an assignee thereof, having himself a direct interest to know who the assignee was, and whether there was one, had fulfilled the requirements of the contract, and executed the deed to the legal assignee, where all parties have power to act. To hold such a recital, constructive notice, would be extending the doctrine, already carried quite far enough, as the three last cases cited declare. The lord chancellor in the last case adds: "I must not part with this case without expressing my entire concurrence in what has, on many occasions of late years, fallen from judges of great eminence on the subject of constructive notice, that it is highly inexpedient for courts of equity to extend the doctrine."

If the recital had been such as to bind Acer also, of course no legal question could arise of this character.

The doctrine laid down in the books that all deeds referred to, upon which the title is based, must be examined as to any facts they may contain at the purchaser's peril, does not reach this case.

If the title on the recital of the assignment appears to have come through an executor or administrator, or a guardian without power of himself to convey, it is the duty of the purchaser to ask for evidence that it has been legally done. Lord Ch., CRANWORTH, in *Ware* v. *Egmont*, *supra*, at page 96, says: "If indeed the title had depended on their being guardians, it would have been the duty of the purchaser to ask for evidence on the subject." (See *Briggs* v. *Davis*, 20 N. Y., 15; 21 id., 574; *Swartwout* v. *Curtis*, 4 N. Y., 415.) (*Neesome* v. *Clarkson*, 2 Hare, 162, 163). In this case the recital showed the defect of title, so in *Brush* v. *Ware* (15 Peters, 93); *Buckhart* v. *Buchess* (2 Bain., 455); *Scott* v. *Evans* (1 McLean, 486); *Morse* v. *Hunter* (1 Gil., 317). When the assignment, as shown by the recital, appears to have been made by the proper person, the purchaser is not compelled to look for any latent defect, or latent equity. See

last case. In *Reeder* v. *Barr* (4 Ham. Ohio R., 458), the court recognizes this rule, and see the cases in the note. In *Bell* v. *Duncan* (11 Ohio, 192), it is held, that when the recital of an assignment is by persons competent to convey, there is no presumptive notice of latent defects in the assignments, no notice to look for latent equities, otherwise if the recital be of persons not competent to convey title. *Coppin* v. *Ferryhough* (2 Br. Ch. Ca., 291) is not an exception. There it appears, page 295, by the argument of the counsel (the case is not stated fully by the court), that the interests of persons claiming under the surrendered lease were excepted in the conveyance.

The defendant in the case at bar, was not bound to call upon the plaintiff to learn whether his contract had been properly assigned or not. (*Buttrick* v. *Holden*, 13 Met., 355).

In the language of the lord chancellor, in *Jones* v. *Smith* (1 Phillips, 244, at 256, above referred to): "Undoubtedly in the present case, a cautious, prudent, circumspect person, would not have advanced the money without the production of the deed. But that is not the principle on which cases of this sort have been decided." Again: "I do not consider this a case of gross negligence, but the party having only omitted that caution which a prudent, wary, and cautious person might, and probably would have adopted," is not to be charged with notice. The majority of men are not "wary," and where no bad faith is found, the law does not usually require such conduct, as can be expected only from the "wary," to protect an innocent purchaser from loss.

Suppose this deed to Curtis had been from Acer himself, and it had contained a recital, that it was given pursuant to, or in execution of a contract of purchase of such a date, but in fact, that contract required the execution of a mortgage to Acer for $3,000, which had never been given, would a mortgagee from Curtis, acting in good faith, be chargeable with knowledge or notice of the contents of that contract? Would he thus have constructive notice so as to be postponed to that mortgage.

Most clearly not. There is nothing in the title deeds, or in the title that gives any reference to that equity, any reference to that defect; and there is no reason, on the face of the papers, why that contract should be examined by a purchaser. Nor was there any reason in the case at bar. It is unlike *Bisco* v. *Barberry* (1 Ca., in Ch., at 291); *Moore* v. *Bennett* (2 id., 246.)

If any defect had been alluded to in the recital, or if such defect would have appeared in any deed or will in his chain of title, then the purchaser is charged with constructive notice thereof, especially if such deed or will be recorded. (*Gibert* v. *Peteler*, 38 N. Y., 165; *Jumel* v. *Jumel*, 7 Paige, 591; *Grimstone* v. *Carter*, 3 Paige, 421; *Tuttle* v. *Jackson*, 6 Wend., 213; *Childs* v. *Clark*, Barb. Ch., 52.) In the language of the able Vice-Chancellor Sir JAMES WIGRAM, in *Weet* v. *Reid*, (2 Hare., at 260); "let the doctrine of constructive notice be extended to all cases (it is, in fact, more confined). Let it be extended to all cases, in which the purchaser has notice that the property is affected, or has notice of facts raising a presumption that it is so, and the doctrine is reasonable, though it may sometimes operate with severity. But once transgress the limit which that statement of the rule imposes; once admit that a purchaser is to be affected, with constructive notice of the contents of instruments not necessary to, nor presumptively connected with the title, only because by possibility they may affect it, and it is impossible to stop short of the conclusion, that every purchaser is affected with notice of the contents of every instrument, of the mere existence of which he has notice."

The purchaser must be presumed to investigate the title, and to examine every deed or instrument forming a part of it, especially if recorded. In all the cases referred to, where recitals have been held to be constructive notice of the defect or of the equity, the recital itself directly referred to the defect. That is, it referred to a title as conveyed by an executor or administrator, or by a widow or her second hus-

band, when the title was in the first, or by a guardian, etc. In all cases, other than conveyances or assignments by parties themselves competent to assign, the purchaser is bound to see that the conveyances have been made according to law, so as to carry the title. Not so where the recital states nothing to arrest the attention or arouse the suspicion of a person of ordinary care, as that the conveyance is made pursuant to a contract with the vendor, or with Mr. Acer, the assignor of the vendee, who assigned the contract to him, and he is entitled to a deed in fulfillment thereof. The parties being all competent to convey, no constructive notice of Acer's equity is found there. But as a different case may be made by plaintiff upon another trial, the judgment is reversed and a new trial ordered, costs to abide event.

All concur except ALLEN, J., dissenting.

Judgment reversed.

HENRY B. DAVIS, Appellant, *v.* DANIEL LOTTICH, Respondent.

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One tenant in common, or joint owner, cannot maintain an action for the possession of personal property against his co-tenant.

If the co-tenant sells, or converts the property, he may have his action for damages, or hold his title with the purchaser. He cannot compel a delivery of the possession to himself of the whole property.

Plaintiff and C., being the owners of certain premises, upon which was a steam saw-mill, contracted to sell the same to T. By the contract, which was executed by the vendors only, T., was to acquire his interest, and was not to remove, or take away any of the machinery or property, until the whole purchase-price was paid. T., assigned the contract to K., and three others. Plaintiff and C. thereupon conveyed to K. an undivided one-fourth of the property upon his paying in full therefor. Defendant L., with the knowledge and consent of K., sold the engine and machinery to defendant L, and the same were removed from the premises with the intent of shipping them to Michigan. Plaintiff brings action to recover possession.—*Held*, that the conveyance to K., was not made in pursuance of the executory contract, and to the extent of the grant extinguished the conditions therein; that it vested in him an absolute estate in fee,

Statement of case.

and conferred upon him all the rights of a tenant in common; and that, as plaintiff could not maintain the action against K., he cannot against defendants, who obtained their right to hold it through him.

(Submitted September 12th, 1871; decided November 10th, 1871.)

APPEAL from an order of the General Term of the eighth judicial district, reversing a judgment entered in Cattaraugus county in favor of plaintiff, upon the report of a referee, and granting a new trial.

The action is to recover possession of a steam engine and boilers, taken from the premises hereafter mentioned.

In October, 1865, the plaintiff and one Comstock were the owners in fee as tenants in common of fifteen acres of land, on which was located a steam mill with engine and boilers attached. On that day they executed to one Tallent an agreement, of which the following is a copy:

"For value received, we hereby agree with Alfred Tallent, that we will sell and convey to him by a good and sufficient warrantee deed, upon the conditions hereafter expressed, the following property situate in Olean, New York, to wit: The mill known as the Olean Lumber Company's mill, with all the machinery and appurtenances thereto pertaining, together with fifteen acres of land surrounding said mill and race; and also three dwelling-houses, one boarding house, one office, and the lower or western barn, situate on said land, together with the race and booms. This agreement is made upon the condition precedent, that we neither part with any title or interest in said property; nor does the said Tallent acquire any interest therein in law or equity, until or unless he pays unto us the sum of $20,000; $8,000 on the 14th day of November, 1865, $4,500 on the 23d of November, 1865, and the balance in six months from this date, with interest.

"It is understood that the said Tallent shall not remove and take away from said premises any of the machinery, or property located on said land, until he shall pay said purchase-money. It is further understood, that said fifteen acres of land shall be located according to the plat hereto annexed.

In case of failure to make said payment as aforesaid, this contract shall be null and void.

"Dated October 21st, 1865.

"H. B. DAVIS,
"J. K. COMSTOCK."

Tallent went into the possession of the property, and prior to the 15th of December, 1865, sold and assigned his interest in the said contract, to Kornaman, Applegate, Schomberg and Lottich. The interest of each assignee was one-quarter, and they went into possession of the property, and so remained in the possession until the property in suit was removed.

On the said 15th of December, 1865, the plaintiff and said Comstock conveyed to Kornaman, one of said assignees, an equal undivided one-fourth part of said land, machinery and appurtenances, under the said Tallent contract.

On the 8th of February, 1866, Comstock and wife sold and conveyed all of their remaining interest in the land and contract to the plaintiff. At the time of the conveyance to Kornaman, he paid up to the plaintiff and Comstock, the full one-quarter of the purchase-money, stipulated to be paid by the terms of the contract with Tallent.

After Comstock conveyed to the plaintiff, the latter commenced an action in the Supreme Court against Tallent, and all the assignees thereof, except Kornaman, and a judgment of sale and foreclosure of three-fourths of said land and appurtenances, and due and unpaid on said contract as fixed by the judgment, was $5,000.

In November, 1866, the defendant Lottich, with the knowledge and consent of Kornaman, Schomberg and Applegate, sold the engine and boiler to the defendant Jerome, and removed them from the premises, for the purpose, and with the design of moving them out of the State, and permanently separating them from the real estate. The plaintiff demanded the possession of the defendants, they refused, and this action was commenced. The property removed was part of the realty at the time of the delivery and sale.

The value of the property was fixed at $3,500. Judgment for the plaintiff, for return of the property and to collect in lieu thereof the value, $3,500.

D. H. Bolles, for appellant. If at time of the removal plaintiff had actual, or constructive and exclusive possession or right of possession, his action was well brought. (*Ely* v. *Ehle*, 3 Com., 506; *Beecher* v. *Bennett*, 11 Barb., 374; *Depew* v. *Leal*, 2 Abb. Pr. R., 131, 137; *Baker* v. *Hoag*, 3 Sel., 555; *Wheeler* v. *McFarland*, 10 Wend., 319; *Ingersol* v. *Van Bockkelin*, 7 Cow., 670; *Laflin* v. *Griffith*, 35 Barb., 58.) Tallent and his assignees entered under a simple license. This does not prevent reclaiming the property wrongfully severed from the estate. (*Suffern* v. *Townsend*, 9 John., 35; *Cooper* v. *Stevens*, 9 John., 331; *Ives* v. *Ives*, 13 John., 235; *Kellogg* v. *Kellogg*, 6 Barb., 116; *Spencer* v. *Tobey*, 22 id., 260; *Eggleston* v. *N. Y. and Harlem Railroad Co.*, 35 id., 162.) The execution of the deed to K. did not affect plaintiff's right of possession. (*Depew* v. *Leal*, 2 Abb., 131; *Beecher* v. *Bennett*, 11 Barb., 374; *Morris* v. *Whitcher*, 20 N. Y., 41; *Whitbeck* v. *Waine*, 16 N. Y., 532.)

A. G. Rice, for respondent. One tenant in common can not maintain action for possession against a co-tenant. (*Russell* v. *Allen*, 13 N. Y., 173; *Hunt* v. *Fitzgerald*, 2 Mass., 509; *Wright* v. *Bennett*, 3 Barb., 451; *Rogers* v. *Arnold*, 12 Wend., 30; *Prosser* v. *Woodward*, 21 Wend., 210; *St. John* v. *Sterling*, 2 Johnson, 468.)

CHURCH, Ch. J. One tenant in common, or joint owner, cannot maintain an action for the possession of personal property against his co-tenant. This action is a substitute for the action of replevin under the Revised Statutes. The plaintiff must be the owner of the property, or have a special property therein, which entitles him, as against the other party, to the possession of the property. A mere stranger cannot hold possession against a part owner, without connect-

ing himself with a person having some legal right to the possession. If he sells or converts the property, the co-tenant or joint owner may, at his option, have his action for damages for the conversion, or hold his title with the purchaser. He cannot be deprived of his property without his consent, or without redress; but he cannot compel a delivery of the possession to himself of the whole property, because his co-tenant has an equal right. These principles are well settled. (*Russell* v. *Allen*, 13 N. Y., 178; *Hart* v. *Fitzgerald*, 2 Mass., 509; *Wright* v. *Bennett*, 3 Barb., 451; *Rogers* v. *Arnold*, 12 Wend., 30.) Section 277 of the Code provides, that in such an action the plaintiff may have judgment for the recovery of possession, or the value thereof, in case a delivery cannot be had. The plaintiff must be entitled to possession for some purpose of the property; and if a delivery cannot be had, he is then entitled to the value thereof, which he will hold in lieu of the property. (13 N. Y., 173, *supra*.)

In this case, Kornaman united with the defendants in severing the property from the freehold, and selling it to Jerome; and the referee finds, that it was done with his express consent. The defendants, therefore, connect themselves with the title of Kornaman; and if the plaintiff is not entitled to the possession as against him, he is not against the defendants; and this depends upon the question, whether Kornaman held the title to the undivided fourth of the property, discharged from the conditions of the antecedent executory contract of sale, or subject to them. If the former, he was a tenant in common of the real estate with the plaintiff before severance; and a joint owner of that part of it severed and turned into personal.

In *Whitbeck* v. *Waine* (16 N. Y., 532), this court held, that the execution and delivery of a deed by a vendor, pursuant to an executory contract for the sale of land, a portion of the purchase-money remaining unpaid, and no fresh security therefor being taken, did not extinguish the contract in respect to a provision therein, for an increase or rebate of the

purchase-money, in proportion to the excess or deficiency which might exist in the land.

This was based upon the fact, that the conveyance was only a part performance of the contract; that the provisions in relation to securing the purchase-money remained unperformed, and the stipulation to pay for the excess, or rebate for the deficiency of land, remained in full force, and qualified the general terms of the deed.

In *Morris* v. *Whitcher* (20 N. Y., 41), it was decided, that a conveyance of land, given in pursuance of an executory contract, did not merge or extinguish a stipulation in the contract, that the vendor should retain possession of the premises, beyond the period when the conveyance was made; that the conveyance was a performance of the vendor's agreement, and the stipulation of the purchaser, to permit the vendor to remain in possession. might co-exist, if such was the intention of the parties, without any violation of legal principles; and the reasoning of COMSTOCK, J., with which I fully agree, conclusively establishes, that an agreement to convey does not extinguish other covenants which the parties intend shall remain operative. The intention of the parties is material, and is to be determined by the circumstances of each case. Where the conveyance is in pursuance of the contract, and is only in part performance, and is not necessarily inconsistent with other stipulations, it may be inferred, that the parties intended the latter to remain in force.

Although impressed with the equities of the plaintiff in this case, I am unable to bring it within the principle of the cases referred to.

In the first place, it is to be observed that this contract was executed by the vendor only. It is an agreement to sell upon certain conditions. The purchaser could only acquire title by complying with these conditions, but he made no express agreement to perform them. Kornaman and three others became assignees of the contract, and occupied the position of the original purchaser. One of the conditions was, that the vendor parted with no interest or title in the

premises; another was that the purchaser acquired no interest therein by the contract, either at law or in equity, until the whole purchase-money was paid; and then follows the provision, that no part of the machinery or property was to be removed. This provision added nothing to the security of the vendor, under the prior conditions. Under these the purchaser would clearly have had no right to the possession, or to interfere in any manner with the premises, until he paid the purchase-money. It might be claimed that the clause against removing property was an implied license to enter into possession.

At all events, it did not strengthen the force of the previous conditions. The receipt of one-fourth of the purchase-money, and the absolute conveyance of an undivided fourth of the premises, was not made in pursuance of the executory contract, but was a new contract materially varying the prior one. By the executory contract the vendor was to convey the whole premises upon receiving the whole consideration. He was under no obligation to receive a part, and convey a proportionate part of the premises. When he did this, it was in pursuance of a new contract. It must have been so, because the old contract provided for no such conveyance. This conveyance, therefore, must have its legal effect and operation, to vest in the grantee an absolute estate, in fee, to the premises granted, and to confer upon him all the rights of a tenant in common of the property.

To the extent of the grant, it extinguished the conditions, that the purchaser should have no legal or equitable interest; and that the vendor parted with no interest.

In these respects the conveyance must speak for itself. There was no reservation or qualification of the interest or title conveyed. It is conclusive evidence, of a new and different contract, from that contained in the antecedent agreement. It is, however, urged in the able argument of the counsel for the appellant, that the contract is still operative as to the removal of property, and that notwithstanding the deed, the plaintiff retained possession of the whole for the purpose of

enforcing his security. The clause in question did remain operative as to three-fourths of the property. As to that, the vendor clearly had a right to the possession as a tenant in common with Kornaman. The conveyance gave the latter no legal right to remove or convert the property; but that is not the point. The question is, whether the conveyance gave to the grantee the legal estate of one-fourth unencumbered, and the rights of an owner; and this is vital upon the right of the plaintiff to maintain this particular action. If the plaintiff intended, as is claimed, to reserve possession of the whole premises, for the purpose of enforcing his security for the balance of the purchase-money, he should have reserved it in the deed. This was not only not done, but he conveyed it free from the lien of the balance of the purchase-money. And when he foreclosed, judgment was had only against three-fourths. It is impossible to uphold the plaintiff's views, without overturning familiar and important principles, respecting the legal effect and conclusiveness of written instruments. (*Stebbins* v. *Eddy*, 4 Mason, 414; *Smith* v. *Evans*, 6 Binney, 102; *Williams* v. *Hathaway*, 19 Pick., 387; *Howes* v. *Barker*, 3 J. R., 506.) Kornaman, therefore, became by the conveyance a tenant in common with the plaintiff of the real estate; and after severance of the property in question, they stood in the same relation to it as personal; and as the plaintiff could not recover in this action against him, he cannot against the defendants, who obtained their right to hold it through him.

The judgment must be affirmed.

All concur except PECKHAM, J., dissenting.

Order affirmed and judgment absolute for defendant.

Statement of case.

46	401
112	388
112	549
46	401
122	577
46	401
150	509
46	401
152	75
46	401
160	389
46	401
173	231

THE PEOPLE ex rel. GEORGE W. McLEAN et al., Respondents, *v.* ETHAN FLAGG, Supervisor, and JAMES W. MITCHEL, Town Clerk, of the Town of Yonkers.

The Constitution of the State confers upon the legislature *all* legislative power; and if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in that instrument itself.

The making and improvements of public highways, and the imposition of taxes, are among the ordinary subjects of legislation. The legislature, therefore, has power to direct the construction of a highway in any town, to compel the creation of a town debt by the issue of its bonds, and to impose a tax upon the property of the town to pay the bonds, without the consent of the citizens or town authorities.

The provision of section 12, art. 7, of the Constitution, prohibiting the creation of debts, except to a limited extent, unless the laws authorizing them are submitted to the people, applies only to State, and not to municipal debts.

Neither the provisions of the act of 1869 (chapter 272, Laws of 1869), authorizing the towns of Yonkers and East Chester, in the county of Westchester, to make and improve several highways, etc., nor the act of 1870 (chapter 340, Laws of 1870), amending the same, are in violation of section 13, art 7, of the Constitution, which directs, that every act imposing a tax shall distinctly state the tax, and the object to which it is to be applied. Those acts recognize a distinction between the "road" and the bridges, provision is made for the raising of money by the issue of bonds, etc., to pay for the former, and the amount is limited. But no provision is made to pay for the latter; and the issue of bonds for that purpose could not be required.

The commissioners appointed under said act of 1869, are authorized to construct the roads therein specified, and to require the issue of bonds to pay therefor, without waiting for the confirmation of the report as to the four additional roads specified in the act of 1870.

(Argued September 5th, 1871; decided November 10th, 1871.)

APPEAL from an action of the General Term of the second judicial department, affirming an order of Special Term awarding a peremptory mandamus, directing defendants to issue the bonds of the town of Yonkers in the sum of $60,000, pursuant to certain acts of the legislature, relating to the laying out of roads in the towns of Yonkers and East Chester, in the county of Westchester.

Statement of case.

The relators are commissioners appointed by chapter 262, of the Laws of 1869, entitled "an act to authorize the towns of Yonkers and East Chester, in the county of Westchester, to widen, make, extend, and improve several highways in said towns."

Sections 1 and 2 appoint the commissioners with power to lay out and build four roads in said towns.

Section 3 empowers the commissioners to build the road in sections with this restriction. "But no part of the money to be expended shall be paid out, nor any contract thereof made until all the roads, for their entire length, have been laid out and established as herein provided; and the rights of way shall be acquired for the section of the road on which the money is to be expended."

Sections 4 and 5 require surveys and maps to be made, and commissioners of assessment and estimate to be appointed, who are to report their assessment to the court, to be confirmed, modified, or sent back as the court shall direct.

Sections 6 to 12 provide, that after the report is confirmed, it shall be delivered to the commissioners, "who shall be, thereupon, authorized to cause such improvements to be made."

Section 17 vest the commissioners with power, to make, grade, drain, gravel, and improve the roads; and to construct all necessary bridges therefor.

Section 21 limits the aggregate expenses of "making, grading, draining, and improving said road" to $10,000 per mile, *exclusive of bridges.*

Section 19 directs, that such sums as shall be necessary "to make, grade, drain, and otherwise improve said roads," shall be raised by the sale of town bonds, to be issued by the town supervisor and clerk, upon the requisition of the commissioners. The commissioners are to convert the bonds into money, and use the proceeds in "making and improving said roads." All the acts required to be done by sections 1 to 62 were done before April 11, 1870, when the report of the commissioners of estimate and assessment was confirmed by the Supreme Court, and delivered to relators.

The legislature then passed an act amending the original one (chapter 340, Laws of 1871.) Four additional roads were authorized. That portion of section 3, above quoted, was repealed. The limitation of expense in section 21 was changed to $20,000 per mile.

The relators made a contract for building the road authorized by the original act, and made a requisition upon the defendants, supervisor, and town clerk, of Yonkers, for bonds to the amount of $60,000. The length of the road in that town was $11\frac{9}{10}$ miles; the contract price over $60,000. The defendants refused to issue the bonds.

W. A. Butler, for appellants. The acts, as far as they provide for the issuing of bonds by relators, without the consent of the taxable inhabitants, are unconstitutional and void. (1 R. S., 337, §§ 1, 2; *People* v. *Mayor, etc.*, 4 N. Y., 419; *Thomas* v. *Leland*, 24 Wend., 65; *People* v. *Lawrence*, 41 N. Y., 123; *Bank of Rome* v. *Village of Rome*, 18 N. Y., 38; S. C., 19 N. Y., 20; *Starin* v. *Town of Genoa*, 23 N. Y., 439; *People* v. *Mead*, 24 N. Y., 114; *Clarke* v. *City of R.*, 28 N. Y., 605; S. C., 13 How., 206; *People* v. *Mitchell*, 35 N. Y., 551; *Thomson* v. *Lee Co.*, 3 Wal., 327; *People* v. *Com. Council, N. Y.*, 3 Keyes, 81; *Swart* v. *Hulburt*, 51 Barb., 312, 317; *Hampshire* v. *Franklin*, 16 Mass., 83; *People* v. *Mayor, etc.*, 51 Ill., 17; *People* v. *Salomon*, 51 Ill., 37.) They are void under section 12, article 6, of the Constitution. (*People* v. *Kern*, 27 N. Y., 188; *Newell* v. *People*, 7 N. Y., 9.) It was a condition precedent to construction of work, that all the eight roads should be laid out. (*Town of Duanesburgh* v. *Jenkins*, 46 Barb., 294; *Eli* v. *Holton*, 15 N. Y., 595; *McKibbon* v. *Lester*, 9 Ohio., N. S., 627; *Hartung* v. *People*, 22 N. Y., 95, 109; *I. and M. Canal* v. *Chicago*, 14 Ill., 334.)

F. N. Bangs, for respondents. The relators are ministerial officers, having no discretion, and are liable for refusal to act as commanded by law. (*Caswell* v. *Allen*, 7 John., 63;

People v. *Mayor of B.*, 1 Hill, 545; *People* v. *Brooks*, 1 Denio, 457; *Morris* v. *People*, 3 Denio, 382; *Ross* v. *Curtis*, 31 N. Y., 606; *People* v. *Martin*, 58 Barb., 286.) The act does not confer unlimited power of taxation. The expense of roads is limited. No power to tax for bridges is given. (*Clark* v. *Rochester*, 28 N. Y., 605; Laws of 1851, p. 767, § 285; Laws of 1853, p. 596; *Bank of R.* v. *Village of R.*, 18 N. Y., 38; Laws of 1869, chap. 907; *People* v. *Mitchell*, 35 N. Y., 551; *Starin* v. *Genoa*, 23 N. Y., 441; *Gould* v. *Sterling*, 23 N. Y., 456.) The act of 1870 does not change the position of relators, in reference to the roads mentioned in act of 1869. (*Eli* v. *Holton*, 15 N. Y., 595; *Duanesburgh* v. *Jenkins*, 46 Barb., 294.)

CHURCH, Ch. J. The legislation involved in this case is challenged upon the ground, that it is not competent for the legislature, to compel the town of Yonkers to incur a debt for the improvements authorized to be made. It is conceded that the legislature could direct the improvements to be made, and could lawfully impose a tax upon the property of the citizens of the town to pay the necessary expenses, or that it might authorize a town debt to be created, with the consent of the people of the town, or some officer or officers representing the municipality; but that it cannot directly compel the creation of the debt, without the consent of the citizens or town authorities.

All legislative power is conferred upon the senate and assembly; and if an act is within the legitimate exercise of that power, it is valid, unless some restriction or limitation can be found in the Constitution itself. The distinction between the United States Constitution and our State Constitution is, that the former confers upon congress certain specified powers only, while the latter confers upon the legislature *all* legislative power. In the one case the powers specifically granted can only be exercised. In the other, all legislative powers not prohibited may be exercised. It cannot be denied, that the subject of the laws in question is within legislative

powers. The making and improvement of public highways and the imposition and collection of taxes, are among the ordinary subjects of legislation. The towns of the State possess such powers as the legislature confers upon them. They are a part of the machinery of the State government, and perform important municipal functions, which are regulated and controlled by the legislature. Private property cannot be taken for public use without compensation. But this principle does not interfere with the right of taxation for proper purposes. The legislature, in substance, directed certain highways to be made and constructed in the town of Yonkers, and imposed a tax upon the town to pay the expenses of the work, but to prevent too large a tax at one time, it directed bonds to be given, payable at different periods, so that no more than a limited sum should become due at one time.

The bonds to be given are town bonds; they are to be issued by town officers, and the tax to pay them is imposed upon the property of the town. If the legislature may authorize the town to incur this debt, why may it not direct it to be done? As a question of power, I am unable to find any restriction in the Constitution. It is not within the judicial province to correct all legislative abuses.

That local expenditures and improvements should, in general, be left to the discretion of those immediately interested, is manifestly just, and is in accordance with the theory of our government. But when power is conceded, we have no right to inquire into the motives or reasons for doing the particular act.

The legislation in question is open to serious criticism. It compels a large, if not extravagant expenditure of money, and imposes onerous burdens upon the people without their consent. If the object of the expenditure was private, or if the money to be raised was directed to be paid to a private corporation, who were authorized to use the improvements for private gain, the question, in my judgment, would be quite different; and in this respect there is a limit, beyond which

legislative power cannot legitimately be exercised. But the defendants cannot avail themselves of this principle. Here the purpose is confessedly public, and the taxing power for such purposes is restrained only by restrictive provisions, and whether a tax shall be imposed for the whole expenditure in one year, or spread over a series of years; and in the meantime the obligations of the town, given on matters of detail and discretion, which do not affect the power, and with which courts cannot interfere. It is claimed however, that the laws in question, violate that provision of the Constitution, which prohibits the creation of debts, except to a limited extent, unless the laws authorizing them are submitted to the people. (Constitution, art. 7, sec. 12.)

The provision is, "except the debts specified in the tenth and eleventh sections of this article, no debt shall be hereafter contracted *by or in behalf of the State*, unless such debt shall be authorized by a law," etc., to be submitted to the people. The debts referred to in the tenth and eleventh sections which are excepted, are, 1st. Debts which, in the aggregate, shall not exceed one million of dollars to meet "casual deficits," "failures in revenues," or "for expenses not provided for." 2d. Debts to repel invasion. Collating the tenth, eleventh, and twelfth sections, it is evident that the prohibited debts are State debts; that is, debts against the State as such, and not town, county or city debts. The latter, unfortunately, are not prohibited. If the prohibition applied to municipal debts, it would not be competent for the legislature to authorize the creation of any such debts, except by a submission to the people. It is manifest that they can confer such authority, and there is nothing in the Constitution that forbids the legislature from exercising the power, directly itself, for proper local public purposes.

It is quite clear that the creation of the debt in question is not within the meaning of, and is not, therefore, prohibited by the restrictive clauses in the Constitution against the creation of State debts.

It is also claimed that these acts violate the thirteenth

section of the seventh article of the Constitution, which provides, that "every law which imposes, continues, or revives a tax, shall distinctly state the tax and the object to which it is to be applied."

It is urged, that while the cost of the *roads* are limited to $20,000 a mile, exclusive of bridges, the commissioners are authorized to build the bridges; and there being no limitation of the expense of building them, that *the tax* is not distinctly stated, and the laws are therefore void.

Conceding that the construction given to this clause of the Constitution by the defendants is the correct one, and that it applies to a local as well as a State tax, we think the point is untenable. The seventeenth section of the act of 1870, confers upon the commissioners power to make the road, and "to grade, drain, gravel, and improve the same, and construct all necessary bridges therefor." The twenty-first section limits the aggregate expenses of "making, grading, draining, and improving said road" to $20,000 a mile, "exclusive of bridges."

The nineteenth section provides, that "such sums of money as may be necessary to make, grade, drain, and otherwise improve said road, shall be raised by the issue of town bonds," etc.

We think that this act recognizes a distinction between the "road" and the bridges. It is true the former is limited to $20,000, while the latter is unlimited; but there is no provision in that act, or the act of 1869, for raising the money to pay for bridges.

The clause requiring the issue of bonds must be held to apply to the "road," exclusive of bridges, as specified in the sections referred to. The "said road" is the road specified before, and that road excludes bridges. Neither under the act of 1869 or 1870 could the commissioners lawfully demand the issue of bonds to pay for constructing bridges. The act of 1871 supplied this defect, by expressly authorizing the issue of bonds for the bridges as well as the road, and limiting the expenditure therefor.

It is further objected, that the commissioners were not entitled to the issue of any bonds, until all the roads, specified in the act of 1870, had been duly laid out, and the report of the commissioners of estimate and assessment, as to all the roads, had been confirmed. By the original act of 1869, four roads were authorized to be laid out and improved; and section 3 of that act provided, that "no part of the money to be expended shall be paid out, nor any contract thereof made, until all roads, for their entire length, have been laid out and established as herein provided, and the right of way shall be acquired for the section of the road on which the money is to be expended."

Section 12 provides, that "after the report of the commissioners of estimate and assessment shall be confirmed, the said report shall be delivered to the commissioners for laying out and making said roads; who shall, *thereupon*, be authorized to cause such improvements to be made."

The act of 1870 repealed the clause above quoted in section 3, but left section 12 unaltered. The report of the commissioners of estimate and assessment, as to the four roads specified in the act of 1869, was confirmed before the amendatory act of 1870 was passed, and no report has been made as to the four additional roads specified in the act of 1870.

By the repeal of the express restriction contained in section 3, we may infer an intention to have the four roads, as to which the report of the commissioners of estimate and assessment had been confirmed, constructed without requiring the confirmation of the report as to the additional roads. Section 12 is not necessarily inconsistent with this intention. At most, it contains only an implied restriction; and it is entirely consistent with the repeal of section 3, by construing the implied prohibition against proceeding with the work, to apply only to such portions of the improvements as to which no report had been made or confirmed; or, in other words, that the commissioners were authorized to proceed with such of the improvements as to which a report had been confirmed. Looking at all the provisions of both acts, and the action of

the legislature, this seems to be the most rational construction. Besides the right to have the bonds issued is not made dependent upon the confirmation of the report, and it is, at least questionable, whether the town officers could avail themselves of this point if the construction claimed should prevail; but it is unnecessary to determine this question.

We feel constrained to affirm the judgment.

All concur.

Judgment affirmed.

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114 500
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127 385
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133 565
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WALTER J. WRIGHT, Appellant, v. DEWITT C. HUNTER, Respondent.

An order of the General Term granting a new trial upon questions of fact, in a case tried by a jury, is not appealable.

Where the case was tried by jury and the return shows, that questions of fact were legitimately before the General Term, and that the new trial may have been granted upon questions of fact, the appeal will be dismissed.

(Submitted September 11, 1871; decided November 10, 1871.)

APPEAL from order of the General Term of the eighth judicial district, reversing a judgment entered in Cattaraugus county upon the verdict of a jury, and also an order denying defendant's motion to set aside such verdict, made on the minutes of the court. The facts upon the question decided appear in the opinion of the court.

D. H. Bolles, for appellant. The court is bound to presume judgment was set aside on questions of law only. (*E. R. Bank* v. *Kennedy*, 4 Keyes, 279.)

E. C. Robbins, for respondent.

Opinion of the Court, per RAPALLO, J.

RAPALLO, J. An appeal lies to the General Term of the Supreme Court, *on the law*, from a judgment entered on the report of referees, or the direction of a single judge, in all cases; and *upon the fact*, when the trial is by the court or referees. (Code, § 348.)

No appeal on the fact, from the *judgment*, lies to the General Term, when the trial is by jury.

A party, desiring to obtain a review of the finding of a jury, must make a motion to set aside the verdict on the evidence, and for a new trial, either to the judge at the circuit, on his minutes, pursuant to section 264, or to the court at Special Term, pursuant to section 265. An appeal from the order of the judge at circuit, or of the court at Special Term, on such motion, will lie to the General Term, under section 349; the order of the judge at circuit being regarded as a Special Term order.

Prior to the year 1860, decisions of the General Term granting or refusing new trials upon questions of fact, were not reviewable in this court in any case; but in that year a provision was inserted, in section 268, relative only to cases tried by the *court*, that if the judgment is reversed at General Term on questions of fact, the question whether it should have been reversed, either on questions of fact or of law, should be open to review in the Court of Appeals; and it is also enacted in the same clause, that if the judgment is reversed at General Term, it shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal.

The same provisions are, by section 272, applied to cases tried by a referee.

There is no provision in the Code for the review in this court of an order of the General Term granting a new trial upon questions of fact, where the case was tried by a jury; and the general provision of section 11, authorizing appeals from orders granting new trials, has not been construed as entitling the appellant to a review here of the decision of the

General Term upon questions of fact, except in cases tried before the court or a referee. (30 N. Y., 134.)

If, therefore, in a case tried before a jury, the judgment has been reversed, and a new trial granted upon questions of fact, and the proceedings have been regular, an appeal will not lie to this court.

The question in this case is, how it shall be made to appear in a case where the trial was by jury, and a new trial has been granted at General Term, whether such new trial was granted on questions of law or of fact.

In cases tried before the court or a referee there is no difficulty, for sections 268 and 272 provide, that the judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the judgment of reversal; and this court has no power to look elsewhere.

But sections 268 and 272 not being applicable to cases tried by a jury, we find ourselves, as to such cases, as free from any statutory rule, as if the requirement of a statement in the judgment did not exist, and we must look at the return for the purpose of determining whether the judgment was or may have been reversed as questions of fact.

In the case of *The East River Bank* v. *Kennedy* (4 Keyes, 279), cited by the appellant, WOODRUFF, J., after showing that the requirements of sections 268 and 272 are not applicable to cases tried by jury, says, that in such cases a party against whom a new trial has been granted upon questions of fact, ought not to be enabled to avoid the order by appealing to this court, and here showing that no error of law was committed upon the trial. But that, to prevent that result, the party obtaining the new trial should see to it that it be made to appear by the record, or in some other proper manner, that the new trial was ordered upon questions of fact.

We are inclined, and we think that the prior adjudications of this court require us, to go farther than the learned judge to whose opinion we refer.

Considering that the appellant is the party alleging error in the decision of the General Term, it seems to us that the

burden should be upon him, to show that the granting of a new trial was erroneous in matter of law. If it appears by the return that exceptions were taken at the time, and that there was no substantial conflict as to the facts, or that no application for a new trial was made to the judge at circuit, or to the Special Term, we are justified in assuming that the General Term passed exclusively upon questions of law, no others having been properly before them; and we will review those questions. But where the return shows that questions of fact were legitimately before the General Term, and that the evidence was such that the court may have reversed the judgment on the facts, it is impossible to say, from an inspection of the record, that they committed an error of law in granting a new trial, though we should be of opinion that none of the exceptions were well taken.

In the cases of *Hoyt* v. *Thompson's Ex'rs* (19 N. Y., 208, 211); and *Miller* v. *Schuyler* (20 N. Y., 522), it was held, that unless the case was such as to negative any inference that the new trial was granted on questions of fact, an appeal from the order presented no question of law for adjudication by this court. Those decisions were made before the amendment of 1860, allowing a review here upon the facts in cases tried before the court or a referee, and are no longer applicable to that class of cases. But they are applicable to cases tried by jury, the law in respect to them being the same as when those decisions were rendered.

The return upon which the present appeal was heard, shows that, after the rendition of the verdict, a motion was made to the judge at the circuit upon the minutes, to set aside the verdict, and for a new trial upon the exceptions, and for insufficient evidence, pursuant to section 264. That this motion was denied, and judgment entered without prejudice to a review of the verdict on the evidence, as well as the exceptions, on appeal to the General Term, as if judgment had not been entered. That thereupon, appeals were taken to the General Term from the judgment, and also from the order denying the motion made upon the minutes for a new

trial on the exceptions, and for insufficient evidence. That that appeal was heard upon a case setting forth the evidence, and also containing exceptions. That an order was thereupon made by the General Term reversing the judgment and granting a new trial, but not stating upon what ground, and a judgment was entered in conformity with that order.

The case was regularly before the General Term for review, as well upon the facts as the law. The evidence was such as to justify a reversal upon the facts, and in addition to all this, the opinion of the court below, after reviewing the evidence and expressly approving of the rulings of the judge at the trial, states that the error was not that of the judge, but of the jury. That their verdict ought to have been for the defendant, and that, therefore, it should be set aside and a new trial granted.

I think that these considerations are sufficient to satisfy us that this appeal does not present a question of law, and should be dismissed for that reason. There is no reason for depriving the defendant of the new trial he has obtained, on account of his failure to obtain an entry of the grounds of decision in the judgment of reversal, there being no statute requiring or authorizing such entry to be made. The appeal should be dismissed.

All concur.

Appeal dismissed.

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161 334

ANDREW L. IRELAND, Appellant, *v.* WILLIAM H. NICHOLS, Respondent.

A lease contained a covenant upon the part of the tenant, not to sublet without the written consent of the landlord, under penalty of forfeiture, etc. The tenant sublet with the knowledge of the landlord, who subsequently received the rent.

Held, that this was a waiver of the forfeiture, and the right of the landlord founded upon the subletting, or the occupancy thereunder, was gone.

(Argued September 18th, 1871; decided November 10th, 1871.)

Statement of case.

APPEAL from a judgment of the General Term of the city of New York, entered upon order denying motion for new trial, and directing judgment for defendant on verdict in his favor.

The action is to recover possession of a house and lot leased by the plaintiff to the defendant Nichols.

The plaintiff, through his agent, John B. Ireland, executed a lease to defendant Nichols, of the premises in question, situate on Eight avenue, in the city of New York, for seven years from May 1st, 1861. The lease contained a covenant, that the lessee would not let nor underlet the whole or a part of the premises, without the written consent of the lessor, under penalty of forfeiture and damage. The rent was payable monthly, in advance. The lessee did, on the 1st day of May, 1868, underlet a part of the premises without the written permission of the lessor.

The lessor's agent knew of this underletting immediately after it was made, and with full knowledge and notice of such underletting, the lessor received rent for said premises from the lessee, from month to month after the 1st day of May, 1868, and up to November 1st, 1868. The tenant who went in on the subletting in May, remained in possession up to the time of the commencement of this action. The action was commenced November 9th, 1868.

On the trial a verdict was ordered for the defendant, and the plaintiff's exceptions directed to be heard at the General Term in the first instance. The General Term overruled the exceptions and ordered judgment for the defendant on the verdict.

J. D. Warren for appellant. After lease was forfeited, the *onus* was on defendant to show waiver (*Lawrence* v. *Williams*, 1 Duer, 585), and plaintiff entitled to the most favorable interpretation of evidence. (*Cook* v. *N. Y. C. R. R. Co.*, 3 Keyes, 476.) Knowledge of agent insufficient to waive the conditions of lease. (*Greyson* v. *Harrison*, 2 D. & E., 425; 1 Smith's Lead. Cases, 88; *Bleeker* v. *Smith*, 13

Wend., 536.) Occupancy under subletting is a continuing forfeiture. (*Dumpor's Case*, 1 Smith's Lead. Cases, 91; *Brown* v. *C. and S. R. R. Co.*, 2 Kern., 492.) Receipts of rent only waiver up to time to which rent is paid. (*Jackson* v. *Allen*, 3 Cowen, 221; *Bleeker* v. *Smith*, 13 Wend., 532; *Stewart* v. *Hunter*, 4 Sand. Ch., 591; *Ambler* v. *Woodbridge*, 17 E. C. L. R., 399; *Fowler* v. *Peck*, 20 E. C. L. R., 417; *Newton* v. *Gladwin*, 51 E. C. L. R., 958; Tyler on Ejectment, 314; Taylor's Landlord and Tenant, § 500; *Manice* v. *Millen*, 26 Barb., 44.) Waiver is question of intent, and should have been submitted to the jury. (*Jones* v. *Carter*, 15 M. & W., 718; *Doe* v. *Meaux*, 1 Car. & P., 346; *Menice* v. *Miller*, 26 Barb., 41; *I. and Traders' Bank* v. *Christie*, Rob. 5, 169.)

D. F. Walden, for respondent. If landlord, with knowledge of forfeiture, recognizes the tenancy, he waives the forfeiture. (1 Parsons on Con., 5th ed., 506; 2 Platt on Leases, 471; 1 Wm. Saund., 287, 288; 1 Wash on Real Pro., 454.) Acceptance of rent after forfeiture is waiver. (1 Wm. Saund., 287, 288; *Doe* v. *Bliss*, 4 Tant., 735; *Bleecker* v. *Smith*, 13 Wend., 530, 533, 534; *Croft* v. *Lumley*, Ellis B. & Ellis, 1069; S. C., 6 House of Lords Cases, 672; S. C., 5 Ellis & B., 648; *Dendy* v. *Nicholl*, 4 C. B., N. S., 376, 387, and cases cited, Am. ed.; COCKBURN, C. J., *Perry* v. *Davis*, 3 id., 773; *Croft* v. *Lumley*, Ellis B. & E., 1069; 6 House of Lords Cases, 672.) Occupancy under subletting not a continuing forfeiture. (*McKildoe* v. *Darricott*, 13 Grattan, 278.) Notice to agent was notice to plaintiff. (*Bank of U. S.* v. *Davis*, 2 Hill, 451; *Sutton* v. *Dillaye*, 3 Barb., 529; *Weaver* v. *Denison*, 10 N. Y., 68; *Wilson* v. *Genesee Mut. Ins. Co.*, 14 id., 418; *McEowen* v. *Montgomery Co. Mut. Ins. Co.*, 5 Hill, 101.)

GROVER, J. The only ground upon which a recovery of the demised premises was claimed, set out in the complaint, was a forfeiture of the lease incurred by the defendant

Nicholls, by subletting a portion of the premises, without the consent, in writing, of the plaintiff, as required by the lease. The answer admitted that the forfeiture had been incurred, and set up a waiver thereof by the plaintiff. The only question upon the trial was, whether the forfeiture had been waived. The defendant, Nicholls, testified that he underlet the premises in May, 1868. That "Mr. John B. Ireland, who was plaintiff's agent of the premises, knew it at the time. He is the same person who signed the lease. I told him I was going to underlet the premises. I told him afterwards that I had done it. I afterwards paid him the rent up to the 1st day of October, 1868, and received from him the following receipts:" Receipts were introduced, showing payment of all rent up to November 1st, 1868, to John B. Ireland. It was agreed by the parties that the persons to whom the premises were sublet in May, 1868, continued in possession under such letting until after the commencement of the action, November 9th, 1868. The evidence authorized the judge to assume, that John B. Ireland was the general agent of the plaintiff, in respect to the leasing and care of the premises, and collecting the rents. His knowledge of the subletting, and the receipt by him of rent, subsequently accruing with such knowledge, had the same effect in waiving the forfeiture as such receipt by the plaintiff personally, with like knowledge, would have had. Any act done by a landlord, knowing of a cause of forfeiture by his tenant, affirming the existence of the lease, and recognizing the lessee as his tenant, is a waiver of such forfeiture. (1 William Saunders, 287; 2 Platt on Leases, 471; 1 Wash. on Real Property, 454.) The receipt of rent subsequently accruing from the tenant by the landlord is such an act, and the forfeiture thereby waived. (*Bleecker* v. *Smith*, 13 Wend., 530; *Jackson* v. *Allen*, 3 Cow., 220; and authorities cited by SUTHERLAND, J., 230.) The counsel for the appellant concedes, that such is the law, but insists, that as rent was only received up to November 1st, 1868, and the action not commenced until after that time, he is still entitled to recover for the reason, that the occupancy,

under the subletting, continued until the commencement of the action; and that there was a continuing cause of forfeiture, so long as the occupancy under the subletting continued. The error of the counsel's position, is in regarding the subletting as continuous. That was a distinct act occurring in May; and when the sub-lessees entered into possession under it the forfeiture was complete, had the plaintiff elected to enforce it. But he waived it, as we have seen, by receiving rent subsequently accruing, with knowledge of the forfeiture. The subtenants, by their contract with the lessee, Nicholls, acquired the right of possession for the term fixed by the contract as against him, and their right was defeasible only by the plaintiff's proceeding to enforce the forfeiture. When the plaintiff waived this right by the receipt of rent, the right founded upon the subletting or the occupancy, in pursuance thereof, was gone. It is true, that the condition not to sublet was continuous, and had Nicholls made a new contract for subletting any portion of the premises, a forfeiture would thereby have been incurred, which the plaintiff would have been at liberty to enforce. But no such new contract has been made. The case expressly shows, that the possession of the subtenants was in pursuance of the contract made in May. The forfeiture incurred by this contract having been waived by the plaintiff, was not revived by the subsequent possession of the subtenants in pursuance thereof. There was no suggestion of a right of recovery either in the complaint or at the trial, for the failure to pay the rent for the month of November, in advance, pursuant to the lease. Had such claim been made, for aught that appears, it would have been shown that such rent had been paid, in advance, as required by the lease. It was too late to raise the question upon the hearing of the exceptions by the General Term. The judge, upon the uncontroverted testimony, was right in directing a verdict for the defendant; and the judgment rendered in his favor thereon must be affirmed.

All concur.

Judgment affirmed.

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WILLIAM E. WHITE and WILLIAM R. WHITE, Respondents, v. JANE SMITH, Appellant.

In an action brought upon an account for work, labor and materials, the complaint alleged the amount of the account to be $541.90, and that there was a balance due, *after deducting all payments*, of $175.75,—*Held*, that the complaint admitted a payment of $366.15, and that defendant was not precluded from insisting upon this admission, by disputing the correctness of the items of the account.

A court or referee is presumed to have knowledge of the contents of the pleadings in a cause, and it is not necessary for a party to read them in evidence, in order to avail himself of admissions therein.

After a trial was commenced before a referee, and a portion of the evidence taken, an adjournment was granted upon plaintiff's motion, in order to enable him to apply to the court for leave to serve a reply to defendant's counter-claim; permission was obtained and reply served. Upon the adjourned day the plaintiff insisted that the trial should be commenced *de novo*; this the referee refused to do,—*Held*, no error.

(Argued September 18, 1871; decided November 10, 1871.)

APPEAL by defendant from an order of the General Term of the sixth judicial district, reversing a judgment entered in Schuyler county, upon the report of a referee. (Reported below in 1 Lansing, 269.)

The complaint alleged that plaintiffs performed work and labor, as carpenters and joiners, for defendant, and furnished materials, to the amount of $541.90; that there was a balance due them, "after deducting all payments made by defendant to the plaintiffs thereon, of $175.75."

The answer was a general denial, and also a counter-claim for damages arising from the unskillful and unworkmanlike manner in which the work was done.

The referee found that plaintiffs did work and furnished materials for defendant to the amount of $501.26; that defendant paid thereon $366.15, leaving unpaid a balance of $135.11. There was no proof of any payment, but he decided that it was admitted by the complaint.

The referee allowed defendant as damages under the counter-claim, the sum of $231.50, and found a balance due the

defendant of $96.39; for which sum he ordered judgment in her favor, with costs.

The trial was commenced upon the 18th April, 1867. No reply had been served to defendant's counter-claim. After a number of witnesses had been sworn and examined, plaintiffs asked for an adjournment, to enable them to apply to the court for leave to serve a reply. The motion was granted, on terms. Upon the adjourned day, plaintiffs' counsel proposed to open the cause and begin the trial anew. The referee decided the trial must continue where it left off, but that plaintiffs might examine any witnesses previously examined, on any new matter, or upon any matter omitted by inadvertance. Plaintiffs excepted.

L. Tremain, for appellant. Conceding the construction of the pleadings by the General Term to be correct, judgment should only have been reversed in case defendant refused to deduct $40.64, and such order should be made here. (29 N. Y., 400; 26 How., 528; 55 Barb., 389; 39 Barb., 298.)

J. J. Van Allen, for respondents. The finding of payment of $366.15 was error. (*McKynney* v. *Bull*, 16 N. Y., 297, 302, 319; Code, § 149.) The referee erred in obliging plaintiffs to resume the trial, after adjournment, where it left off. (*Huntington* v. *Conky*, 33 Barb., 218; *Ayrault* v. *Chamberlain*, id., 229; *Hecker* v. *Hopkins*, 16 Abb., 301; *Littlejohn* v. *Greely*, 13 Abb., 41; *Hallister* v. *Bender*, 1 Hill, 150; *Leete* v. *Gresham Ins. Co.*, 7 Eng. Law Eq. R., 578; *Dorlon* v. *Lewis*, 9 How. Pr. R., 1; *Yale* v. *Gwinits*, How., 353; Graham's Prac., 316, 628.)

PECKHAM, J. The plaintiffs' counsel insists, that the referee erred in finding a payment of $366.15 to the plaintiffs. The Supreme Court so held, and upon that ground set aside the judgment. No point of this kind seems to have been presented at the trial, either in the receipt or exclusion of evidence, or by any decision upon any question raised as to the pleadings.

But as there was no proof given of any payment, and payment is found, and perhaps sufficiently excepted to, the pleadings must contain an admission thereof, in substance or the order must be affirmed. I think they do in substance.

The complaint was for work and materials, and sets forth the items specifically, both of labor and materials, amounting to $541.90. It then claims a balance due therefor, "after deducting all payments made by defendant to plaintiffs thereon of $175.75."

The answer is a general denial, and sets up a counterclaim, etc.

It cannot be denied, that this complaint admits in substance that $366.15 had been paid upon the items in the complaint. It alleged that the items were all just, and that thereafter deducting all payments, there was yet that balance due. It is clear that both parties acted upon the view, that the complaint conceded a payment, and I think with good ground.

The Supreme Court says that the defendant "should have conceded on the trial that the plaintiffs' entire claim was $541.90, as stated in the complaint, to enable him to insist that the complaint showed he had paid the plaintiffs $366.75."

It is clear that the items must all be taken as true to ascertain the amount of the payment, but as a payment, it cannot be claimed to have been any less than that sum, upon those items. Whether the items were all legitimate, were all the subject of recovery, was another question.

The referee, upon the evidence, found the said items that were recoverable, amounted to $501.26, instead of $541.90. Upon the theory of that court, the difference, or $40.64, was the precise error of the referee. I think he committed no error in that.

It is also alleged, that no portion of the complaint was read as evidence before the referee. It was not necessary to read the pleadings. They are presumed to have been before the referee, and that he had knowledge of their contents.

It is insisted, that the referee erred in allowing to defend-

ant, as counter-claim, the cost of the iron roof, etc., made necessary by plaintiffs' defective work. There does not seem to be any exception to that allowance, none to that mode or rule of finding the measure of damage in that item. The referee probably found, and intended thereby to find, that that was the cheapest mode of remedying the defect.

The decision of the referee was right in refusing to commence the trial *de novo*. If the plaintiffs' have suffered injustice, as they claim by the decision of the referee, upon the facts, this court can afford them no remedy.

Order appealed from reversed, and judgment affirmed upon the report of the referee with costs.

All concur; Ch. J. not voting.

Judgment accordingly.

WILLIAM O. WOOD, Respondent, *v.* THE NORTH WESTERN INSURANCE COMPANY, Appellant.

Plaintiff being the owner of a woolen factory and machinery therein, contracted to sell the same to C., the deed to be executed when the whole purchase-price was paid, C., to pay for insurance.

Plaintiff insured with defendant, C., paying the premium. The policy contained conditions precedent, in case the same was held as collateral security, and also restrictions upon the use of inflammable liquids used as a light. Kerosene oil was used for lighting purposes.

Held, 1st. Plaintiff had an insurable interest in the property itself.

2d. The policy was in fact taken for C.'s benefit upon the property, and not upon the debt against him, and was not held as collateral security within the meaning of the condition.

3d. That inasmuch as the legislature has declared certain grades and qualities of kerosene proper and safe to use, the right to take judicial notice could not be invoked, to establish its inflammable (i. e., explosive) qualities; but it was incumbent upon defendant to show, that the kerosene used was in fact "inflammable."

Judicial notice comes in the place of proof, and is generally to be exercised by a tribunal which has the power to pass upon the facts. This court will not take judicial notice of the existence of a fact, which has not been found by the court below, nor upon which a finding has been refused.

(Argued September 15th, 1871; decided November 10th, 1871.)

Statement of case.

APPEAL from a judgment of the General Term of the seventh judicial district, affirming a judgment entered in Wayne county in favor of plaintiff upon the report of a referee.

The action was brought to recover $1,500 on a policy of insurance, of which $750 was on a frame building occupied as a woolen factory, and $750 on the machinery in it, burned at Red Creek, Wayne county, New York, on the 29th of November, 1866.

On the 1st day of January, 1862, the plaintiff made and executed a contract in writing, for the sale of said premises and machinery to one George Campbell, by the terms of which said plaintiff agreed to sell on condition, that said Campbell should perform and fulfill the agreement therein contained and specified, to wit: The said Campbell should pay for said property $4,415.63, as follows; $500 to be paid January 1st, 1863, and $500 on the 1st day of January, 1864, and the balance in annual payments of $600, each with interest on the whole sum unpaid, which was to be deducted or paid out of each annual payment; said Campbell was also to pay the expense of insuring the factory and saw-mill to the amount of $2,000, until the purchase-money unpaid should be reduced to $2,000, and pay all taxes and assessments on said property; all the machinery and fixtures on the premises at that time, or thereafter to be put upon said premises, were to be part of said property, and not to be removed without the consent of plaintiff. And it was further agreed in said contract, that in case said Campbell should neglect or refuse to keep and fulfill all or any of said agreements, he should forfeit all payments made or improvements put upon said premises, and Wood should have the right to enter upon and take possession of said premises, including machinery, tools and fixtures; and treat the said Campbell, as a tenant, holding over without consent and non-payment of rent; and when all the payments were made, said Wood agreed to convey said premises to Campbell by a good deed.

Statement of case.

The policy in question was issued by defendant December 12th, 1863. It contained the following restrictions and conditions:

"Camphene, spirit gas or burning fluid, phosgene or any other inflammable liquid, when used in stores, warehouses, shops or manufactories as a light, subjects the goods therein to an additional charge, and permission for such use must be indorsed in writing on the policy."

(Condition No. 10, paragraph No. 2.)

"A claim against this company by the assignee or mortgagee, or other person or persons holding this policy as collateral security, shall not be payable until payment of such portion of the debt shall have been enforced, as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be held liable to pay such sum, not exceeding the sum insured, as cannot be collected out of such primary security."

The policy was renewed annually; the last renewal was in December, 1865. The premiums were, with the knowledge and assent of Campbell's agent, deducted from the payments made by him on the contract. Kerosene oil was used for lighting the factory, which was run nights. On the 29th November, 1866, the property was destroyed by fire. After the fire Campbell, who had not performed the contract, declined to make further payments, and at his request plaintiff took the property, and the contract was canceled. The value of the machinery destroyed was $2,200; the total loss $3,800. The referee gave judgment for the amount of the policy and interest.

A. J. Parker, for appellant. Defendant is not liable on the insurance on the machinery. (*Murdock* v. *Gifford*, 18 N. Y., 28.) Plaintiff had no insurable interest in the property itself. (*Harris* v. *Troup*, 8 Paige, 423; *Edgarton* v. *Peckham*, 11 Paige, 352.) Plaintiff's interest being an equitable interest, should have been made known to the insurer. (*Kernochan* v. *N. Y. Bowery Ins. Co.*, 17 N. Y., 438, 439.

Per ROSEVELT, J.) The policy was void for want of mutuality. (*Mead* v. *N. Y. Ins. Co.*, 7 N. Y., 530; *Westfall* v. *H. R. Ins. Co.*, 12 N. Y., 289; 2 Greenleaf's Ev., §§ 383, 406, and note 2.) Plaintiff has failed to perform the conditions, and cannot recover. (*Mead* v. *Ins. Co.*, 3 Seld., 530; *Westfall* v. *H. R. Ins. Co.*, 2 Ker., 289; 2 Greenleaf's, §§ 383 and 406, and note 2.) Defendant had a right to be subrogated to plaintiff's rights under the contract. (*Ætna Ins. Co.* v. *Tyler*, 16 W. R. 385, and per Chancellor, 397, 398.)

Jacob B. Decker, for respondent. Plaintiff had an insurable interest in the property. (*White* v. *H. R. Ins. Co.*, 7 How., 341; *Kernochan* v. *N. Y. Fire Ins. Co.*, 17 N. Y., 428; ROSEVELT, J. 441; 2 B. & A., 193; 1 Moody & Rob., 153; *Carruthers* v. *Sheddin*, 6 Taunt., 17; 1 Arnold, 252.) The insurance was for Campbell's benefit, and there could be no subrogation. (17 N. Y., 428.)

FOLGER, J. It appears by the findings of the referee, that Campbell, the vendee of the property insured, by the contract of sale, agreed to pay the expense of insuring the factory and saw-mill; that the plaintiff did insure the property, and pay the premiums therefor, and charge the same to Campbell; and that by so much was lessened the amount paid by him on the purchase-price. It appears from the testimony, that though Campbell did not know of this, yet that his brother, who acted for him with the plaintiff in adjusting, from time to time the payments and indorsing them on the contract, did settle the dealings which included these items of expense for insurance; so that the premiums of insurance were in fact paid by Campbell, under an agreement so to do. It follows, then, that the insurance was really one for the benefit of Campbell. (*Holbrook* v. *Am. Ins. Co.*, 1 Curtis C. C., 193, and cases cited.)

In such case, the defendants had no right of subrogation, even if they issued the policy, without notice of the contract of sale. (*Benjamin* v. *Saratoga Ins. Co.*, 17 N. Y., 415; *Kernochan* v. *N. Y. Bowery Ins. Co.*, id., 428.)

Though the plaintiff's especial insurable interest was that of vendor, holding an equitable lien on the property for the security of the purchase-money, yet he held also the legal title, and this made it competent for him to cover, not only his especial interest in the property, but the property itself. (*Holbrook* v. *Am. Ins. Co.*, *supra*; see, also, *Tyler* v. *Ætna Ins. Co.*, 12 Wend., 507; S. C., 16 id., 385; 1 Phillips on Ins., 347, sub-sect. 640; Angell on Ins., §§ 67, 185, 186, and note.)

And this insurable interest existed in the machinery as well as in the buildings; for though there was a contract of sale, it was executory. The title had not passed, and though Campbell went into possession about two years after the policy was issued, he had no right to remove the machinery, without the consent of Wood. There was never such a delivery of it to Campbell as gave him title. Wood still retained on it a lien for purchase-money, and a right, on non-payment to resume exclusive possession. He had, then, an insurable interest in it. (*Clinton* v. *Hope Ins. Co.*, decided in this court 4th April, 1871; see, also, *Burt* v. *Dutcher*, 34 N. Y., 493; *Tallman* v. *Atlantic Ins. Co.*, 3 Keyes, 87.)

The point made by the defendants, as to the use of kerosene, does not seem to be before us. There is no finding in reference to it. There is no request to find, which the referee has refused. The defendants' exception on this matter is two-fold. 1st. That the referee omitted to find, that the fire was caused by the use of an inflammable liquid. 2d. That the referee omitted to find as a conclusion of law, that the policy was void by a breach of the warranty against the use of such inflammable liquid. As to the first, it suffices to say, that there is neither finding nor proof that the use of an inflammable liquid caused the fire. As to the second, there is no finding of fact that kerosene or any inflammable liquid was used, and a conclusion of law that there was a breach of warranty from its use would be unfounded. Again, though it is proven that kerosene was used in the factory, that substance is not named in the condi-

tions annexed to the policy. It is only designated, if at all, by the phrase, "any other inflammable liquid." This phrase follows the mentioning by name of camphene, spirit gas, phosgene, etc., and it *noscitur a sociis*. To be warranted against, the liquid must be inflammable, as are those enumerated articles. But there is no finding or proof of the character of kerosene in this regard. The defendants ask us to take judicial notice of its qualities, and that it is in its nature like those. If we do this, we are to know, that they are not only so slowly inflammable as to give harmless light by their gradual combustion, but that they are also suddenly explosive, and thus dangerous and harmful. It is this last characteristic inflammability, which is warranted against, in the classes of hazard upon the back of the policy.

But judicial notice comes in the place of proof. It is to be exercised by a tribunal, which has the power to pass upon the facts. That, this court has not in this case. We may not when we have not the findings of fact in review, for the purpose of reviewing the judgment of a referee, take judicial notice of the existence of a fact, which has not been found by the court below, nor upon which a finding has been refused. In the case in hand, that would be to put this court in the place of the referee, and to find a fact, which he was not requested to find, which he has not found, and to his omission to find which, no exception has been taken.

Nor do we deem, that judicial notice may be taken that in all cases, the article of kerosene is explosive.

The legislature has in effect declared, that there is a degree of purity to which it may be brought, and at which it may be kept on sale in cities with comparative safety. (Laws of 1865, chap. 773, § 3; laws of 1866, chap. 872.) The matters of which judicial notice may be taken, are those which must have happened according to the constant and invariable course of nature (Starkie on Ev., 9 Am. ed., 735 margin, 658), or are of such general and public notoriety, that every one may fairly be presumed to be acquainted with them. (1 Phillips on Ev., 5 Am. ed., 619 margin, 514, chap. 10, § 1.) The action of

the legislature seems to assume, that it is not inevitable nor a matter of general and public notoriety, that every grade and quality of this article is explosive. So the power and right to take judicial notice may not be here invoked, and it was incumbent upon the appellants, to make proof if they could, that the kerosene used in the building insured was in fact inflammable; i. e., explosive.

There is the same difficulty with the point made by the defendants upon the second paragraph of the tenth condition. There is no finding upon the matter by the referee, nor any request for him to find which he has disregarded. Apart from this, however, the point would be well met by the considerations previously advanced, that the premiums being practically paid by Campbell, under an agreement so to do, and the policy, in fact, taken for his benefit upon the property, rather than upon the debt against him, it is not held as a collateral security within the meaning of the condition.

The testimony admitted by the referee against the objection of the defendants, does not seem to us to affect the questions upon which the case turns, nor to have had an influence in its determination harmful to the defendants.

The judgment of the court below should be affirmed with costs to the respondent.

All concur.

Judgment affirmed.

LEONARD J. KLINCK, Appellant, *v.* GARDNER R. COLBY et al., Respondents.

Defendants having been defrauded of a large amount of goods, by reason of false representations, and having probable cause to believe that plaintiff was a party to the fraud signed a paper, in which they stated they had been "robbed and swindled" by plaintiff and others, and agreed to bear equally the expenses of prosecuting the offenders criminally

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Statement of case.

Held, that the preparation and signing of the paper was a lawful transaction, and it was a privileged communication; that the terms used, though strong and plain, were not irrelevant, and in the absence of actual malice did not take away the privileged character of the communication.

The exhibition of the paper to an agent of one of the parties defrauded for the purpose of procuring the signature of the principal was privileged.

Where, under section 165, of the Code, defendant in an action of libel or slander pleads the truth of the matter charged as defamatory, and also matters in mitigation, the allegations in justification, although unsustained by proof, are no longer evidence of malice, to be considered by the jury and taken as enhancing plaintiff's damages.

(Argued September 18th, 1871; decided November 10th, 1871.)

APPEAL from order of the General Term of the second judicial district, affirming an order of Special Term granting defendants' motion for a new trial.

The complaint in this action contained two counts, one for false imprisonment, the other for libel.

Upon the first count plaintiff was nonsuited upon the trial. The alleged libel consisted of an agreement signed by the defendants, kept by one of them, and shown to no one else, save to Anderson, one of the firm of Smith & Anderson, agents of William Kirk, an alien, and having full charge and complete control of all his business affairs here. It was presented to him as Kirk's agent to procure Kirk's name to the paper. The following is a copy of the agreement:

"We, the undersigned, merchants of the city of New York, who have been robbed and swindled by Ellery C. Folger, Percy W. Tibbs, William C. Williams, James G. Goggin, L. G. Klink, and S. H. Klink, realizing that justice demands, that said parties should be punished for the offences which they have committed, do hereby pledge and agree with each other, mutually, that we will bear equally all expenses and charges which may be incurred in prosecuting, criminally, said Folger, Tibbs, Williams, Goggin, L. G. Klink, and S. H. Klink, or either of them.

"And it is further mutually agreed that we will contribute equally toward the payment of any judgment or judgments,

which may be recovered against any of the subscribers hereto, arising by reason of any criminal complaint which may be or has been made by any of the subscribers herein, against the said Folger, Tibbs, Williams, Goggin, L. G. Klink, and S. H. Klink, or either of them.

"Witness our hands and seals this 30th day November, 1866, at the city of New York."

The defendants and others, merchants in New York, had been defrauded of a large amount of goods by Folger and Tibbs, by means of false representations; and it appeared that defendants had probable cause to believe that plaintiff was a party to the fraud. The alleged libel was drawn up by defendants' counsel, who advised them that the perpetrators of the fraud had committed an offence against the criminal law.

Defendants' counsel, among other things, requested the court to charge, "that the fact that the defendants have pleaded a justification, is not to be taken into consideration in awarding damages." This the court refused to charge, and defendants excepted. The court did charge. "On the present occasion they (defendants) set up in justification that these allegations are true." "I understand the rule of law to be, that the jury are authorized to infer from this fact, that these people were actuated by a desire to injure the plaintiff. The fact of their inserting the libelous matter in the pleadings in connection with the other evidence in the case, warrant the jury to imply a malicious motive on their part." To which no exception was taken. The jury rendered a verdict for plaintiff for $5,000. A motion for new trial upon the minutes was made, which was granted.

O. L. Stewart, for appellant. A person who has no interest in the action, cannot unite with others in defraying expenses. (4 Blk. Com., 135; *Tallheimer* v. *Brinkerhoff*, 8 Cow., 623; *Burt* v. *Place*, 6 Cow., 631.) This is not a privileged communication. (1 Phil. Ev., 130; *White* v. *Nicholas*, 3 How., U. S., 266; *Thorne* v. *Moser*, 1 Denio, 488;

Armsby v. *Douglass*, 37 N. Y., 477; *Perkins* v. *Mitchell*, 31 Barb., 461, 467; *P. and C. R. R. Co.* v. *Quigley*, 21 How., U. S., 202; *Beardsley* v. *Tappan*, 5 Blatch., 498; *Getting* v. *Foss.* 3 C. & P., 160; *Allen* v. *Crofoot*, 2 Wend., 575.) The libelous words were unnecessary, and are not privileged. (*Gilbert* v. *People*, 1 Den., 41; *King* v. *Wheeler*, 8 Cow., 725; *Hastings* v. *Lusk*, 22 Wend.) Defendants' plea in justification was evidence of malice. (*Root* v. *King*, 7 Cow., 613; *White* v. *Nichols*, 3 How., 226.) The showing the paper to Smith & Anderson was a publication. (*Snyder* v. *Andrews*, 6 Barb., 43; *P. R. R. Co.* v. *Quigley*, 21 How., U. S., 202; *Perkins* v. *Mitchell*, 31 Barb., 461.)

J. Emott, for respondents. The paper was a privileged communication. (*Spill* v. *Maule*, ~~1 R.~~ E. Exch., 232; *Toogood* v. *Spyring*, 1 Cr. M. &. R., 192; *Whitley* v. *Adams*, 15 C. B., N. S., 392; *Hastings* v. *Lusk*, 22 Wend., 410; *Vanderzee* v. *McGregor*, 12 Wend., 545; *Washburn* v. *Cooke*, 3 Den., 110; *Liddle* v. *Hodges*, 2 Bos., 587; *Lewis* v. *Chapman*, 16 N. Y., 372.) In such case actual malice must be proven. (*Washburn* v. *Cooke*, 3 Den., 110; *Lewis* v. *Chapman*, 16 N. Y., 372; *Suydam* v. *Moffat*, 1 Sandf., 459; *Street* v. *Wood*, 15 Barb., 105; *Liddle* v. *Hodges*, 2 Bos., 527.) Where words are irrelevant, if believed to be true, no motive of malice. (*Suydam* v. *Moffat*; *Spill* v. *Maule*; *Warren* v. *Paine*, 2 Sand., 195.) Defendants had a right to combine for the purpose contemplated. (2 Russ. on Crimes, 677; 1 Salk., 14 id., 174; *Master* v. *Miller*, 4 T. R., 320, 340; 2 Bish. Cr. L., 87; 2 Hawk. P. C., 124; *Finden* v. *Parker*, 11 M. & W., 675, 682; 2 R. S., 691, § 8; *Mott* v. *Small*, 22 Wend., 403; *Sedgwick* v. *Stanton*, 14 N. Y., 289.) No publication was proven. (*Vanderzee* v. *McGregor*, 12 Wend., 548.)

FOLGER, J. The paper prepared by the former counsel of the defendants and signed by them, in effect denominated the plaintiff a robber and a swindler. When such a paper is

published, it is *prima facie* a libel (*J'Anson* v. *Stuart*, 1 T. A., 748), and the law implies malice in the author and publisher of it, toward him of whom it speaks. (*White* v. *Nichols*, 3 How. U. S., 266.) In an action brought upon it, no proof of malice is needed in the first instance, beyond the proof of publication itself. (Id.) But when the paper published is a privileged communication, an additional burden of proof is put upon the plaintiff, and he must show the existence of express malice in the publication of it. (Id.) Hence, as a general proposition, it may be said that the question of whether a publication is a privileged communication is one for the jury. That is to say, the court may determine whether the subject-matter to which the alleged libel relates, the interest in it of the defendant, or his relations to it, are such as to furnish the excuse. But the question of good faith, belief in the truth of the statement, and the existence of actual malice, remains; although the court should hold, that *prima facie*, the communication was privileged. And this question is one for the jury. (*Cooper* v. *Stone*, 24 Wend., 434; *Brow* v. *Hathaway*, 13 Allen, 239; and see *Blackburn* v. *Blackburn*, 4 Bing., 395.) And so also the question, whether the alleged libel was in fact published, is in general a question for the jury. (2 Starkie on Slander, Wendell's edition, 17.)

In the case at bar, the learned justice who presided at the trial, left to the jury only to find the amount of the plaintiff's damages, and as incidental to that, whether there was also actual malice. He ruled for the purposes of the trial, that there was a publication of the paper, and that it was not a privileged communication. He had a right to rule upon the question of publication, for the facts in relation to it were not in dispute. We have seen, that he might to a certain extent, rule on the question of privileged communication, and as he decided that it was not a privileged communication, whether actual malice existed or not, was not then necessarily to be left to the jury, as affecting that question.

The rulings of the learned justice upon these points at the trial having been duly excepted to, as appears from the order

made at Special Term, it is now properly before us, to determine, whether he erred at the trial, and was afterward right in reversing those rulings on the motion for a new trial, made upon his minutes.

The first question presented is, was there a publication of the writing?

But as a majority of the court are disposed, to put the decision of this case upon the question of privileged communication alone, it is not necessary to discuss the question of whether or not there was a publication of the alleged libel.

Was the preparation and signing of this paper, so far as its ostensible purpose is concerned, a lawful transaction, and the communication of it by one or some of the signers to others, a privileged communication? That it was, so far, a lawful transaction, we think it beyond doubt.

It is asserted, and not disputed, that the defendants and those in the same predicament, were wronged by means of false representations, of a large amount of goods. These representations were such, as in the judgment of their legal adviser, to be an offence against the criminal law, as well as a wrong to the individual. The learned judge at circuit, as appears from the charge to the jury, ruled as matter of law, that there was probable cause for the belief that the plaintiff was engaged in these transactions.

The purpose of the defendants was, in the main, to agree with one another, to prosecute criminally the plaintiff and others in supposed *pari delicto;* and equally to bear all expenses and charges incurred.

In this, the signers to it, all had a like and peculiar interest. This purpose was lawful not only, but praiseworthy, and the combination was not illegal. (*Regina* v. *Best*, 1 Salk., 174; *Rex* v. *Murray*, Matth. Dig. Cr. Law., 90.)

It is true, as is suggested, in behalf of the plaintiff, that all good citizens have an interest, that a public wrong shall be redressed. And hence he claims, that an especial effort of a few to that end, is not sanctioned. It is not to be ignored however, that the public, except when the higher

and more startling crimes are committed, finds its best aid, in the effort of the individual to punish the public wrong, of which he feels the peculiar smart. And the law itself, relies upon and stimulates private interest as one of its most ready helpers. In the cases last above cited, it is held that several may lawfully meet and consult to prosecute a guilty person, or one against whom there is probable cause of suspicion; and that associations to prosecute felons are lawful. It cannot impair this rule, that those who meet and associate, have felt the wrong as individuals, as well as members of the commonwealth. And it is a perfectly legal and justifiable object, for one to induce another to become a party to a suit, as to the subject-matter in which both have an interest. (*Shipley* v. *Todhunter*, 7 C. & P., 680.)

It appears to us, also, that the communication was privileged. The proper meaning of a privileged communication, is said to be this: that the occasion on which it was made, rebuts the inference arising, *prima facie*, from a statement prejudicial to the character of the plaintiff; and puts it upon him to prove that there was malice in fact, and that the defendant was actuated by motives of personal spite or ill will, independent of the circumstances in which the communication was made. (2 Russell on Crimes, 246, margin, 245, 8th Am. ed.; *Lewis* v. *Chapman*, 16 N. Y., 369–373.) Such an occasion, is when a communication is fairly made by a person in the discharge of some private or public duty, legal or moral, or in the conduct of his own affairs, in matters where his interest is concerned. (*White* v. *Nichols*, *supra*; *Toogood* v. *Spryging*, 1 C. M., and Roscoe, Exch., 181.) A written communication between private persons concerning their own affairs is *prima facie* privileged. And though all that is said is under mistake, yet the words are not for that reason alone, actionable. (*Howard* v. *Thompson*, 21 Wend., 319; *P. W. & B. R. Road* v. *Quigley*, 21 How. U. S., 202; *Rex* v. *Hart*, 1 Wm. Black., 386.) Where both the party making and the party receiving the communication, have an interest in it, it has

never been doubted that it was privileged. (*Lewis* v. *Chapman*, *supra*.) For the sake of public justice, charges and communications, which would otherwise be slanderous, are protected if made *bona fide* in the prosecution of an inquiry into a suspected crime. (*Padmore* v. *Lawrence*, 11 Ad. & Ellis, 380.) But it is said, that granting that the purpose was lawful, and the communication in general coming within rules which make it privileged, still the parties have used opprobious terms without need, and so have overstepped their privilege. Any one in the transaction of business with another, has a right to use language *bona fide*, which is relevant to that business, and which a due regard to his own interest makes necessary, even if it should directly or by its consequences be injurious or painful to another; though defamatory comments on the motives or conduct of another do not fall within that rule. (*Tuson* v. *Evans*, 12 Ad. & Ellis, 733.) So that the inquiry is, could the defendants have accomplished their purpose without using words which charged a crime? It is true that they might, without writing the phrase, "robbed and swindled." It is doubtful, however, whether they could without a paraphrase of it, which would have meant the same thing. The object of the paper was to associate under a written agreement, for a criminal prosecution of certain offenders supposed to be guilty of obtaining goods by false pretences. This object could not well be stated, and its prosecution agreed to, without expressing the crime by some designation, and naming the suspected parties. The terms used are strong and plain, it is true. But if there were no actual malice, the use of plain words does not take away the privileged character of the communication. Intent makes the libel in such a case, strong words do not. (*Shipley* v. *Todhunter*, *supra*; *Hastings* v. *Lusk*, 22 Wend., 410, 415, 416.) Thus in *Finden* v. *Westlake* (1 Moody & Malkin, N. P. Rep., 461), it is ruled, that in libel on a handbill, offering a reward for the recovery of certain bills of exchange, and stating that *A. B.* is suspected of having embezzled them, it is a good defence on the general issue,

that it was published solely with a view to the protection of persons liable on the bills, or toward the conviction of the offender. (And see *Brow* v. *Hathaway*, *supra*.) The use of such terms may fairly be urged to a jury, as showing actual malice. But even then a jury should not look too strictly at the particular expressions used, but ought clearly to see that the paper was written with a malicious intent before they find it a libel. (*Woodward* v. *Lander*, 6 C. & P., 548; *Todd* v. *Hawkins*, 8 id., 88.) And it is not with the plaintiff to urge here, that the cause should have gone to the jury on this point.

It is claimed, also, that as Anderson was but the agent of Kirk, and had himself no immediate personal interest in the matter, the exhibition of the paper to him was a publication of it, and was not a privileged communication. To this we do not assent. Anderson was in this country, an agent of Kirk, in another. He had complete control of Kirk's affairs here. He had, for instance, express power to employ agents and servants. If these defendants had gratuitously written to him of any person, that he was not worthy and had embezzled, it would have been libelous. If, however, Anderson had asked of them that person's character, with a view to employing him, writing thus in answer, if without malice, would not have been libelous; because Anderson had an interest and a proper motive in making the inquiry, and they a proper motive in replying to it; and this, though Anderson acted only for the protection of Kirk's interests in his hands. In the case in hand, Anderson holds no different position. The defendants go to him, as Kirk's agent, for Kirk's name to the paper, it being upon a matter in which they and Kirk have an interest, which interest of Kirk it is Anderson's duty to guard. Anderson stands in the place of Kirk, and as, conceding that it would have been a publication to Kirk, still it would have been privileged; so it is privileged to Anderson.

But it is claimed that there was express malice shown, and that the jury have found that it existed. We are not able to find in

the oral testimony any proof of express malice. The plaintiff claims that it is in the testimony of two of the defendants. He reads their testimony to the effect that their object in the drafting and signing of this paper, was to collect their money from the plaintiff and others, and to get their goods back. If it be conceded that such is the purport of the testimony, yet such a purpose, under the circumstances of the case, would not in our judgment, show malicious feeling. And we do not find in their testimony, that which amounts to the avowal of such a purpose, in the use of this paper.

But the answer of the defendants, sets up the truth of the statements as a justification for making them. On the trial, however, no attempt was made to sustain these allegations by proof.

It is claimed that this was evidence for the jury of express malice in the defendants, and that it enhanced the damages of the plaintiff. It must be conceded, that independent of statute, such is the rule in this State. (See *Bush* v. *Prosser*, 11 N. Y., 347, 350, 366, and cases cited; *King* v. *Root*, 4 Wend., 139; *Fero* v. *Ruscoe*, 4 N. Y., 162.)

It is claimed, however, that this rule has been changed in this State by legislation. It is said that section 165 of the Code has abrogated it. It is provided in that section, that in actions for libel or slander the defendant may in his answer, allege both the truth of the matter charged as defamatory and any mitigating circumstances to reduce the amount of damages, and that whether he prove the justification or not, he may give in evidence the mitigating circumstances.

This section, it is judicially determined, does abrogate another rule which had been as well established, viz.: that though a defendant might give in evidence in mitigation of damages, facts and circumstances which tended to disprove malice by showing that the defendant though mistaken, believed the charge to be true when made, yet if the facts and circumstances offered, tended to establish the truth of the charge, or formed a link in the chain of evidence, going to make out a justification, they were not admissible, even in

mitigation of damages. (See *Bush* v. *Prosser*, *supra*, and cases there cited.) It is not consistent that if the defendant was in fact moved by malice in making the statements, he should be allowed to mitigate by exculpatory evidence, the damages which the plaintiff has sustained thereby. It follows that where he has pleaded the truth of his charges in justification of making them, and also matters in mitigation, as allowed by the Code to do, the answer of justification, though unsustained by proof, can no longer be taken as *conclusive* evidence of malice against him, and as aggravating the plaintiff's damages. For the principle upon which the defendant may mitigate the damages, or in other words, lessen the amount, which shall be recovered against him, for an act of his which he cannot justify, is that though wrong, he was mistakenly and thus perhaps innocently, wrong. But if he was malicious, he could not be innocent, even if mistaken. How then if the answer of justification unproved, shows malice *conclusively*, can the defendant disprove that conclusion, by showing facts in mitigation? It follows, to my apprehension, from the section of the Code referred to, and the decision in *Bush* v. *Prosser* (*supra*), that where facts in justification of a libel, and facts in mitigation of the damages therefrom are pleaded in the same answer, that the allegations in justification, though unproved, are no longer evidence of malice to be considered by the jury, and taken as enhancing the damages of the plaintiff. And such is the answer in the case at bar.

But as at the trial the answer of justification was put to the jury as evidence of malice, the jury would have been warranted in finding under that instruction, that there was express malice in the defendants. And if the jury so found, then the communication cannot be defended as privileged. For the defendants did not except to this instruction, and it was at the trial unchallenged as the law of the case.

It is claimed that the jury have so found. It is to be noticed, however, that the instruction to the jury was not, that the justification pleaded and not proven, was conclusive

evidence of malice, but was a fact from which they might infer a desire in the defendants to injure the plaintiff, and imply a malicious motive on their part. So that the jury were not necessarily forced by this instruction, if they found at all for the plaintiff, to find actual malice in the defendants. There seems no other ground for the claim that the jury did find express malice, than that the discretion so to find was committed to them by the court; and that they have found a verdict for more than nominal damages. It is to be noticed, however, that the court also told the jury, that it was their duty to award some damages; that the plaintiff had a legal right to recover such an amount, as would compensate him for the actual injury which he had sustained; that beyond that they might give him punitive and exemplary damages, as might seem warranted by the facts of the case; that if the defendants were not actuated by malice, this would go very far to mitigate the amount; and if they acted on an honest belief, justified by the facts, it ought to go very far to mitigate any punitive and exemplary damages; that in case of honest mistake, not actuated by malice, while the parties should make ample compensation, and the damages should be in proportion to the injury received; yet if the jury thought themselves warranted in going beyond that, and giving punitive damages, their discretion should be very much restrained as to the amount. From these instructions the jury could well understand, that though they should not find express malice, but a case of honest mistake, not actuated by malice, still they might feel warranted in giving punitive damages, beyond ample compensation, for injuries received. The jury gave $5,000 damages. If we call this amount punitive and exemplary, are we able, under these instructions, to say that it was based upon a finding of actual malice? We think not.

But further than this. In an action for libel, where, under an answer proper to that end, the defendant has shown that the communication was privileged, his further answer of justification by the truth of the charge, though

without proof given to sustain it, may not be taken into consideration as evidence of malice, and in aggravation of the damages. (*Wilson* v. *Robinson*, 7 Q. B. Ad. & Ellis, N. S., 68.) The jury may not look for the actual malice which shall nullify the privilege, in the fact that the defendant has put upon the record a justification which he has not attempted to sustain. It is true, as before noticed, that the jury were told, that they might take this answer into consideration as evidence of malice; which instruction was not excepted to. But this instruction was given after it had been ruled by the court, that the alleged libel was not a privileged communication, which last ruling was excepted to. And that exception makes available, in behalf of the defendants, the rule above stated from *Wilson* v. *Robinson*. We conclude, then, that the learned justice erred at the trial in holding, that the communication was not a privileged one; and that his holding upon the law was not afterwards remedied by any fact found by the jury.

We conclude that the order granting a new trial to the defendants, on account of that error, and the judgment of the General Term affirming that order were correct, and the plaintiff, the appellant, having given the stipulation required on appeal, there should be judgment absolute for the respondents, with costs.

All the judges concurring, judgment accordingly.

ALFRED G. COOK, Appellant, *v.* EPHRAIM K. GREGG, Respondent.

The provisions of chapter 459, Laws of 1862, as amended by chapter 814, Laws of 1867, authorizing the seizure of animals trespassing upon private premises, are constitutional.

The act does not impose a penalty for the trespass, but simply prescribes and fixes the remedy therefor; and remedies are clearly within the peculiar province of legislation. The temporary seizure and detention of property, as authorized by the statute, awaiting judicial action, is not

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violative of the provisions of Art. 1, § 6, of the Constitution, directing that no person shall be deprived of property without due process of law.

(Submitted September 14, 1871; decided November 10, 1871.)

APPEAL from judgment of the General Term of the sixth judicial district, affirming a judgment entered in Madison county, upon decision of court dismissing plaintiff's complaint.

The action was brought to recover the possession of two cows, seized by defendant while trespassing upon his premises in the town of Stockbridge, Madison county. Defendant justified under chapter 814, Laws of 1867, amending chapter 459, Laws of 1862.

Defendant seized and took into his possession one cow, while trespassing on his premises, July 8th, 1868. He made complaint upon the same day; the justice issued his summons on the 10th. The second cow was also seized, trespassing, on the 10th July, and complaints made on the same day; summons issued the 13th. At the time the suit was commenced, the cows were in the possession of the constable, who held the warrants issued by the justice directing their sale, and had been advertised by him for sale under said warrants.

M. J. Shoecraft, for appellant. Plaintiff, having seized the cows and instituted the proceedings, if act is unconstitutional or proceedings not in compliance with it, he is liable. (23 N. Y., 264, 269, 275; 11 How., 17; 16 Barb., 309; *Mills* v. *Martin*, 19 J. R.; 15 Wend., 631; 10 Wend., 349; 8 Barb., 216; 6 Barb., 79; *Cresson* v. *Stout*, 17 J. R., 116; *Hopkins* v. *Hopkins*, 10 J. R., 369; 23 Wend., 462, 470.) Defendant must strictly comply with statute. (35 N. Y., 310; 10 J. R., 253.) Section 2 of the act of 1867 is unconstitutional. (*Rockwell* v. *Manny*, 35 N. Y., 302; *McConnell* v. *Van Arnum*, 56 Barb., 534; *Levitt* v. *Thompson*, 56 Barb., 542; 47 Barb., 562; 2 Kent's Com., 13; *Taylor* v. *Porter*, *et al.*, 4 Hill., 140; Sedgwick on Const. Law, 542, 587, 610, 611.

Story on Const. Law, § 1789; 1 Burrill Law. Dic., 524; *Rockville* v. *Nearing*, 35 N. Y., 305, 306.)

S. T. Holmes, for respondent. If any defect in proceedings existed, it should have been pointed out. (17 Wend., 142; 4 id., 278, 484; 3 Comst., 47; 2 Wait's Pr., 634; 8 id., 109; 13 id., 296; 2 Ker., 442, 486; 2 Cow. Tr., 3d ed., 454.) The act of 1862, as amended by the act of 1867, is constitutional. (18 N. Y., 200, 214, 216; 35 N. Y., 314; *Fox* v. *Dunkel*, 55 Barb., 431; *Campbell* v. *Evans*, 54 Barb., 566 [45 N. Y.]) Replevin cannot be brought to recover goods in custody of law. (14 John. R., 87; 19 id., 32; 2 Wend., 475; 15 id., 402; 1 id., 109.)

ALLEN, J. The only question presented by the record in this case, is as to the validity of the act of the legislature, under which the plaintiff's cattle were arrested, and proceedings had for their condemnation and sale.

The other points made by the appellant were not taken upon the trial, and cannot, therefore, be considered by this court.

Although the questions other than that as to the constitutionality of the law referred to in the brief of the counsel, are not in the case, it may not be improper to say, that the appellant has lost nothing, by omitting to take the objections at an earlier stage of the action. The objections are clearly untenable, and most of them frivolous.

In *Campbell* v. *Evans*, decided by this court in April, 1871, not yet reported, it was held that the act under consideration, amending the "act to prevent animals from running at large in public highways," and also creating a short bar to actions arising under the act (Laws of 1867, chapter 814), was not violative of the Constitution of this State, declaring that no person shall be deprived of life, liberty, or property, without due process of law. (Constitution, article 1, § 6.)

We then decided that the procedure provided by the act, for the judicial condemnation and sale of cattle, offending

against its provisions, by the judgment of a competent tribunal after judicial investigation, according to the accustomed forms of judicial proceedings, was "due process of law," within the meaning of the Constitution, and a full compliance with the requirements of that instrument. The act of 1867 cured the defects of the act of 1862, which were regarded as fatal in *Rockwell* v. *Nearing* (35 N. Y., 302).

A reconsideration of the question is not called for at this time; and the judgment then pronounced is decisive of the main question presented by this appeal. Whether the seizure is for an offence against the public, as for running at large in the highway, or a private wrong as for trespass upon lands is immaterial. The same procedure is given for the trial of the question involved; and the condemnation of the cattle seized in both cases; and in both, if in either, is "due process of law," within the terms, by the Constitution.

The temporary seizure and holding of the property, awaiting judicial action, is not prohibited by the Constitution.

That is not a bereaving or a divesting of the owner of his property, and is not forbidden. Property may be attached and held to be disposed of by judicial action, and judgment by such process, or by such agents without process, as the legislature may direct. But no man may be divested, stripped of his property, and the title and right of property transferred to another, except by "due process of law." There can be no "due process of law," as that term is used in the Constitution, as interpreted and defined by the courts, for the preliminary seizure and detention of property for trial, and to abide the final judgment of a court of competent jurisdiction.

That it is within the province of the legislature, to prescribe and regulate the remedies for trespass upon lands, is not questioned; and it is not in excess of legislative power, or a violation of any principle of Constitutional law, to give to the party injured a lien upon the property, whether animate or inanimate, found trespassing. This right has existed in the owner of lands from a very early period in the history of the coun-

try, from which we have inherited the common-law, and has always been recognized and allowed in this State.

A man finding beasts of another wandering on his grounds, damage feasant, that is, doing him hurt or damage by treading down his grass and the like, may, by the rules of the common-law, distrain them till satisfaction be made him. (3 Black, Comm., 7.) The proceedings upon such distress are, in this State, regulated by statute, and provision is made for a summary appraisal of the damages by the fence viewers, and an impounding and sale of beasts, or the safe keeping and sale of inanimate property for the payment of the assessed damages. (2 R. S., 517.)

The process given by the act of 1867, is a very decided improvement upon the summary proceedings under the Revised Statutes, as it gives the owner of the property the benefit of a formal trial after notice, as a condition precedent to a sale; and does not compel a resort to an action of replevin, although that remedy for an unlawful seizure and detention of his property is still open to him.

Remedies are clearly within the peculiar province of legislation, and may be changed, and made to correspond to altered circumstances and new conditions, provided constitutional restrictions and prohibitions are not invaded.

The act of 1867, does not impose a penalty in respect to animals found trespassing, and arrested in pursuance of its provisions. It does authorize a penalty, when cattle are found running at large in a public highway. The only sums that can be awarded under the act, to the owner of lands, upon which animals are found trespassing, aside from the actual damages sustained, are a reasonable compensation for keeping the animals from the time of seizure to the time of sale, and a small amount prescribed by the act for making the seizure. The statute only provides for indemnity, and it was competent to the legislature, to fix the amount to which the party should be entitled for the labor, and loss of time, in seizing the offending animals, and the amount allowed is reasonable. Every other charge upon the animals, or their

owner, is for compensation to the justice and constable for official services.

The action was commenced before the sale, and the regularity of the sale, and the proceedings after the sale are not involved.

Nothing that transpired after the commencement of the action, can avail to give an action to the plaintiff. When the action was brought, the property was in the custody of the constable under lawful process, and a judgment regularly rendered, and which is still unreversed. The objection that the process was not issued by the justice, until some two days after the complaint was made, was not taken at the trial, and if it had been, it would have been unavailing.

No action was taken by the plaintiff during the suspension of the proceedings, or rather before the issuing of the summons, and the slight delay of the justice, was at no time objected to by the defendant, or claimed to have vitiated the proceedings. It certainly did not make the defendant, who complied in all respects with the act, a trespasser *ab initio*.

The judgment must be affirmed.

All concur.

Judgment affirmed.

PETER RILEY, Respondent, *v.* THE CITY OF BROOKLYN, Appellant.

The duties and liabilities of the parties to a contract, are measured by the terms of the contract to which they have formally assented, and not by anything that preceded.

Plaintiff contracted to furnish the materials, and grade and pave Ninth avenue from Twelfth street to Greenwood, in Brooklyn, "agreeable to the profile of said avenue on file in the office of the street commissioner, and to keep the same in order for one year." Annexed to the profile was an unsigned statement, purporting to be "an estimate of about the work to be done, etc." The maps and profile showed that the avenue crossed a swamp. After the work was done, the avenue sank about ten feet.

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Held, that the maps, estimates, profiles and proposals constituted no part of the agreement, save as referred to in and made a part of it; that no other or different agreement would be implied, than that expressed in the written contract, and that under it plaintiff was bound to restore the avenue, and could not recover therefor.

(Submitted September 15, 1871; decided November 11, 1871.)

APPEAL from judgment of the General Term of the second department, affirming judgment entered in Kings county upon report of referee in favor of plaintiff. (Reported below, 56 Barb., 559.)

Plaintiff entered into a written contract with the city of Brooklyn on the 13th day of April, 1865, for grading and paving Ninth avenue, in the city of Brooklyn, from Twelfth street to the Greenwood cemetery. The work was advertised by the city under the charter, and bids invited for the work, according to the profile map on file in the street commissioner's office. In and by said contract he agreed "to furnish all the materials and do all the work necessary to grade and pave Ninth avenue from Twelfth street to the Greenwood cemetery with the best bank paving stone, setting curb and gutter stone, and laying all the necessary crosswalks, agreeable to the profile of said avenue on file in the office of the street commissioner. And also to keep said work in repair for one year after the completion of the same, at his own cost and expense; and in case he shall neglect or refuse, then the said board of contracts are hereby authorized to have said repairs done, and charge the expense thereof to the said party of the second part."

Attached to the profile was a paper headed as follows: "Estimate of about the amount of work to be done and materials required to finish the grading and paving of Ninth avenue from Twelfth street to Greenwood cemetery."

Plaintiff entered upon the contract and completed the same. Two or three days afterward the work sank about eleven feet. The defendant refused to pay plaintiff until he filled it up again, and again laid the curb and gutter, and paved the street. Plaintiff took his last payment, and under protest.

It took about 30,000 yards more of earth than was stated in the estimate above referred to, and it cost plaintiff about $6,600 to repave and reset curb and gutter. To recover for this extra work and material this action is brought.

W. C. De Witt and *J. Johnson*, for appellant. (Points cannot be found.)

J. H. Bergen, for respondent. There is no question raised that this court can review. (*Lewis* v. *Ingersoll*, 38 N. Y., 347; *Weed* v. *N. Y. and H. R. R. Co.*, 29 N. Y., 616; *Marco* v. *L. and L. Fire and Life Ins. Co.*, 35 N. Y., 664; *Bergin* v. *Wemple*, 30 N. Y., 319.)

ALLEN J. All prior negotiations between the plaintiff, and the agents, and representatives of the defendant, concerning the work to be done, were merged in the written agreement of the 13th of April, 1865. The maps, profiles, estimates, and proposals before then made, constitute no part of the consummated agreement between the parties, except as they are referred to in the contract, and by such reference incorporated into and made a part of it.

The duties and liabilities of the parties are measured, by the terms of the contract to which they have formally assented, and not by anything that preceded. The foundation of the action as alleged in the complaint, is what the pleader has called an implied promise, there being no allegation of an express promise. Fraud is not alleged, and had it been, and the representations relied upon proved to be fraudulent in fact, and that the plaintiff had been induced by them to enter into the agreement, he would be deemed to have waived all claim by reason of the fraud, having after the discovery of the truth, proceeded under the contract, and performed the work agreed to be done. But there is no question of fraud in the action. The complaint of the plaintiff and the foundation of his recovery, is the statement which was annexed in some way to the paper, upon which the pro-

file of the contemplated improvement was exhibited, purporting to be an "estimate of about the work to be done, etc." It was unsigned and did not import strict accuracy, or in any way to qualify or vary the work as indicated by the profile and specifications.

It was not in fact, and was not understood to be a warranty, that the work to be done, and materials to be furnished should not exceed the quantities named in the statement, and was not referred to in the agreement subsequently entered into.

The work was done as contemplated by the act under which it was undertaken (chapter 169 of the Laws of 1861), by contract, and by it the plaintiff in terms, agreed to furnish all the materials and do all the work, necessary to grade and pave the avenue within the limits named, with the best bank paving stone, etc., "agreeable to the profile of said avenue on file in the office of the street commissioner," in the manner and with the materials as specified in detail. He further agreed "to keep said work in repair for one year after the completion of the same at his own cost and expense."

The profile clearly exhibited the existing surface of the street and the proposed changes of grade, and the filling in of earth, and the excavations to be made were matters of calculation. The character of the soil and the substrata of the roadway, were as well known to the plaintiff as to the inspectors and agents of the defendant, and were open to his examination and survey, and the map and profile, which were the basis of the contract, disclosed upon its face the existence of the swamp, which it is now claimed, required the excess of earth to fill.

The plaintiff expressly agreed with full knowledge, or the means of knowledge of all the facts at his command, to grade and pave the avenue over and across the swamp, and to keep it in repair for a year after its completion, for a compensation specified in the contract. He has but performed his contract, and has earned and received the agreed price. There is no room for the implication of any other or dif-

ferent promise on the part of the defendant, than that expressed in the contract. The parties having made a valid contract, which has been performed, the law will not make another for them, although the result of the one made, may not have been as favorable to one of the contracting parties as was expected. The restoration of the road to its proper condition, after it had sunk from its new grade, by reason of the instability of the ground, was but a performance by the plaintiff of his agreement to keep it in repair for a year, and there is no claim that more filling in of earth was done, than was required, to bring the street to the grade designated upon the profile referred to in the contract. The plaintiff has not made a case entitling him to recover, and the judgment must be reversed and a new trial granted, costs to abide event.

All concur; save Ch. J., and FOLGER, J., not voting.

Judgment reversed.

SAGE v. VOLKENING.

It is no excuse for the non-service of copies of the case, as required by rule 7 of this court, that appellant has not caused the return to be made and filed, as required by rule 2.

(Argued November 14, 1871; decided November 16, 1871.)

MOTION to vacate order dismissing appeal for non-service of papers. The excuse offered was that the return had not been made and filed.

J. H. Reynolds, for motion

S. Hand, contra.

ALLEN, J. By the second rule of the court, it is made the duty of the appellant, to cause the proper return to be made, and filed with the clerk of the court, within twenty days after

the appeal shall be perfected. Upon his failure to do so, proceedings may be taken by the respondent, to compel the same to be done, or in default thereof, for a dismissal of the appeal. But the respondent is not compelled to resort to this proceeding, and his omission to do so does not relieve the appellant from the consequences of his neglect, or put him in a position in which he may allege his own neglect and default, as an excuse for the non-performance of other acts required of him by the rules and practice of the court. Rule 7 of the court requires the appellant, to serve upon his adversary, printed copies of the case within forty days after the appeal is perfected, and this is independent of the duty imposed upon him, to cause a return to be made and filed; and it is no excuse for the non-service of the papers, that he has failed to comply with another rule of the court. The order dismissing the appeal was regular, and as no merits are shown, and the omission to serve copies of the case is not excused, the motion must be denied, with ten dollars costs.

All concur.

Motion denied.

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46 449
120 157

THOMAS J. STEWART, Appellant, *v.* JAMES M. DRAKE, and ALBERT A. DRAKE, Respondents.

Defendants, stockbrokers in the city of New York, purchased for plaintiff certain stocks, under an agreement that they were to advance the money for the purchases, and he to keep with them a margin or security satisfactory to them. A portion of the stock was sold by defendants without giving plaintiff notice of the time and place of sale. Plaintiff repudiated and disavowed the sale. Defendants acceded to such disavowal and notified plaintiff, they would not consider the sale as made on his account, but on their own; and by both parties it was subsequently treated as a nullity as between them. After that, defendants notified plaintiff to furnish additional margin; and upon his failure so to do, and in the afternoon of the twenty-eighth April, served upon him personally, a notice, that unless a satisfactory margin was furnished, or the balance of his account paid, his stocks would be sold at public auction, upon the

Statement of case.

thirtieth April, at 12.30 P. M., at a place designated; and the stocks were sold in accordance with the notice.

Held, that plaintiff had waived his right to recover as for a conversion of the stocks sold at the first sale. That his default in furnishing a satisfactory margin, or paying the balance of the account, entitled the defendants to enforce their lien by the sale of the stock; and that the parties living in the same city, the notice of sale was a timely and reasonable one, and the sale legal.

Held further, that in an action brought to recover damages, for the alleged unauthorized sale of the stock, the answer setting up a counterclaim, it was proper for the referee to state an account between the parties, and to give judgment in favor of defendants for any balance found due them.

(Argued November 14th, 1871; decided November 21st, 1871.)

APPEAL from judgment of General Term, first department, affirming a judgment entered upon the report of a referee.

Action to recover the damages sustained by the plaintiff, for the alleged unauthorized sale of certain shares of stock, and the loss of profits and gains, which the plaintiff would have made upon the same, and the dividends accruing thereon, and for an account of stocks purchased by the defendants for the plaintiff. The defendants were stock brokers in the city of New York, and had from August, 1863, to April, 1864, bought and sold stocks upon the retainer and employment, and for account of the plaintiff to a large amount, the defendants advancing the money for the purchases, and the plaintiff securing them against loss, by reason of a decline in the market, by furnishing them security or depositing with them, moneys to a small per centage of the par value of the stocks. No complaint is made of the transactions and dealings by the defendants, in behalf of the plaintiff, prior to April 19th, 1864. Prior to, and on that day, the defendants had purchased for, and held on account of the plaintiff, two hundred shares of the Ashburton Coal Company stock, one hundred shares of the common stock of the Chicago and Northwestern Railroad Company, and three hundred shares of the guaranteed stock of the Michigan Southern and Northern Indiana Railroad Company. The referee has found, that on the evening of the day preceding, the defendants were in advance for the plain-

tiff on the purchase of the stock, over and above all margin, $48,949.79, and the value of the stock was but $45,650, leaving a deficiency of $3,299.79, and stocks had been, and were rapidly declining in the market, and the plaintiff had been notified before the 18th of April, that the defendants required more margin. On the morning of the 18th of April, the plaintiff left his house in New York and went to Philadelphia, and was absent some ten days, and on the 18th of April the defendants by written notice left at plaintiff's house, demanded more margin. On the 19th of April, the defendants without notice to the plaintiff of the time and place of the sale, sold at the brokers' second board in the city of New York, 100 shares of the guaranteed stock of the Michigan Southern and Northern Indiana Railroad Company, and 100 shares of the Chicago and Northwestern Railroad Company for less than the cost price thereof, and immediately gave notice to the plaintiff of such sale by leaving the same at his house. The plaintiff, on his return from Philadelphia, notified the defendants, that he repudiated and disavowed the sale, and the defendants acceded to such disavowal, and notified the plaintiff they would not consider the sale as having been made on his account. Between the 19th and 30th of April, the defendants on several occasions notified the plaintiff, that unless he furnished more margin they would sell his stock, and on the afternoon of the 28th of April personally served on the plaintiff, a notice that his stocks would be sold at public auction upon the 30th April, at 12.30 P. M., at a place specified in the notice, unless prior to that time, he furnished a satisfactory margin or paid the account, and at the time and place mentioned certain of the stocks were sold by auction, to wit, 300 shares of the guaranteed stock of the Michigan Southern and Northern Indiana Railroad Company, 100 shares of the Chicago and Northwestern Railroad Company, and 100 shares of the stock of the Ashburton Coal Company, and the proceeds credited to the plaintiff. The referee stated an account between the parties, and found a balance due the defendants of $3,235.97, and for that sum with costs the defendants had judgment,

which was affirmed by the Supreme Court at General Term sitting in the first department, and the plaintiff has appealed to this court.

S. Hand, for appellant. The sale of the 19th April was a conversion. (*Markham* v. *Jaudon*, 41 N. Y., 235.) It was of plaintiff's stock. (*Livermore* v. *Northrup*, 44 N. Y., 107.) By this sale the rights of the parties were fixed. (1 Seld., 544; 5 Hill, 76.)

E. S. Van Winkle, for respondents. The referee's findings of fact conclusive. (*Van Steenburgh* v. *Hoffman*, 15 Barb., 28; *Woodin* v. *Foster*, 16 Barb., 146; *Sinclair* v. *Talmadge*, 35 Barb., 602; *Colwell* v. *Lawrence*, 24 How., 324; *Davis* v. *Allen*, 3 N. Y., 168; *Miller* v. *Lockwood*, 32 N. Y., 293; *Wilson* v. *Wilson*, 4 Keyes, 421; *McCabe* v. *Brayton*, 38 N. Y., 196.) No particular shares of stock were marked as plaintiff's property, and all that was required of defendants, was to keep a like number of shares ready for delivery. (*Nourse* v. *Prince*, 4 John. Ch., 490; 7 John. Ch., 69; *Horton* v. *Morgan*, 19 N. Y., 170.) The relation of property, if in bar, entitles plaintiff to only nominal damages. (*Wheelock* v. *Wilson*, 5 Mass., 114; *Halett* v. *Novion*, 14 John., 278; Seely on Dam., 2d ed., 492.)

ALLEN, J. No question is made upon this appeal, as to the regularity of the sale by the defendants on the 19th of April, 1864, of the 200 shares of stock, or the effect of such sale as a foreclosure of the plaintiff and a bar to his legal rights. The principal question considered in *Markham* v. *Jaudon* (41 N. Y., 235) is not, therefore, involved in this action. Both parties assented to regard that sale as a nullity, and neither claimed to have acquired any rights under the same. If the decision in *Markham* v. *Jaudon* (41 N. Y., 235) is sound, the plaintiff might have treated the sale as a conversion of so much of his stock, and brought an action therefor, and recovered the value of the stock sold. But he did not elect so to

do. On the contrary, in his letter to the defendants of 27th of April, the day after his return home, and purporting to have been written immediately on learning of the sale, he disavows and repudiates the alleged sale, and notifies the defendants, that he shall require them to account for all the stocks belonging to him, and left with them, particularly specifying the stocks he claimed still to own, and the same held by the defendants for him, on the morning of and before the sale of the 19th of April. He did not claim as for a conversion of any part of the stocks, but did insist that the defendants should account for all, as if no sale had been made of any part, and as still held by them for him. The defendants at once acquiesced in and assented to the claim of the plaintiff, and agreed to regard the sale as made on their own account, and not as a sale of the plaintiff's stock. Yielding to the claim of the plaintiff, they admitted that they still held his stock, and every part of it, subject to the agreement under which it was bought.

Under this arrangement the duty of defendants was fully performed, if they had at all times stock on hand, to meet the demand of the plaintiff when called upon, or when required by the exigencies of the dealings between the parties. The stock purchased for the plaintiff had no ear mark, and one share being of equal value with every other share of the same stock, the defendants were not bound to deliver, or to have on hand for delivery, any particular shares, or the identical shares purchased for the plaintiff. (*Nourse* v. *Prime*, 4 J. C. R., 490, aff'd 7 id., 69; *Horton* v. *Morgan*, 19 N. Y., 170.)

The plaintiff, on the 27th of April, claimed and insisted that the defendants still held and must account for his stock, and the defendants assented to occupy that position.

The plaintiff, when called upon after that time, to make further advances and furnish a margin, in pursuance of the agreement under which the stock was bought, made no suggestion that any part of the stock had been sold, or any claim to be relieved from making further payments by reason of

such sale. He assumed that the rights of the parties in the situation of his stock, and his liabilities in respect thereto, remained unchanged and unaffected by the sale of the 19th of April. It follows that on the 28th April, the plaintiff was possessed of all his stocks and rights in the stocks purchased by the defendants for him, as if no sale had been attempted, and could have demanded and received them upon payment of the amount due the defendants. As late as the 2d of May, the plaintiff, in a communication addressed to the defendants, claimed that they had still on hand the stocks which had been bought for him before the 19th of April, and had not been sold before that day, again enumerating the stocks he claimed to own. It is quite too late, therefore, for the plaintiff now to fall back upon that sale, and claim to recover as for a conversion of the stock then sold, as the sale was repudiated by him, waived by the defendants, and by both treated as a nullity, so far as the plaintiff and his stocks were concerned.

The question as to the effect upon the right of action, of a restoration of the property to the owner, after a conversion of the same, is not involved. Both parties have agreed, and acted upon the assumption that there was no sale, and consequently no conversion of the plaintiff's stocks, on the 19th of April.

There is no pretence upon the evidence that the defendants, at any time after the sale of the 19th of April, purchased stocks to supply the place of those sold on that day. They simply treated that sale as of their own stock, made on their own account, and continued to hold the plaintiff's stocks until the sale of the 30th of April; and during all that time the rights of the parties, by mutual consent, were the same as if no stocks had been sold on the 19th, and had the plaintiff complied with the calls repeatedly made upon him, to increase his margin by making a deposit, made necessary by the decline of the shares in the market, the defendants could not have sold the same as they did; or, had the plaintiff elected to pay for the stocks at the prices for which they had been purchased, he could have demanded, and would have been

entitled to receive, the same from the defendants. The corresponding right was with the defendants, to enforce their lien by a sale of the stock, upon the failure of the plaintiff to comply with the agreement on his part, and his default in making a proper deposit or furnishing satisfactory security.

The referee has found, upon evidence warranting his conclusions, that after notifying the plaintiff several times between the nineteenth and thirtieth of April, that unless he furnished more margin they would sell his stocks, the defendants did, on the twenty-eighth of April, notify the plaintiff personally, and in writing, that unless a satisfactory margin was placed in their hands, or the balance of the account paid, they should sell the stocks held on his account, designating and describing them, at public auction, on Saturday, the thirtieth of April, at an hour and place named in the notice. The plaintiff failed to make the payments or improve his margin, and certain of the stocks were sold pursuant to the notice, and the proceeds credited to the plaintiff. At the time of the sale the value of the stocks, together with the margin or deposit of the plaintiff with the defendants, was considerably less than the cost price of the stocks on hand, and the advances made by the defendants in the purchase; and this, under the agreement as found by the referee, that the plaintiff was at all times to keep with the defendants a margin, or security, entirely satisfactory, authorized the sale of the stock by the defendants, and such sale was clearly regular and legal. A notice given on the afternoon of Thursday, of a sale to be made at half-past twelve o'clock on Saturday, was a timely and reasonable notice, the parties living and being in the city of New York where the sale was made, and all the transactions had.

The giving of any notice of that sale was denied by the plaintiff; and the evidence in relation to it was conflicting. But there was evidence, which, if believed, proved the fact as alleged by the defendants; and the finding of the referee in accordance with that evidence, is conclusive in this court. The referee, upon a statement of the accounts between the

parties, found a balance due to the defendants, for which judgment was given. This was proper. The judgment for the defendants was based upon the terms of the agreement between the parties as found by the referee, and a failure of the plaintiff to furnish a margin or security for the advances made by the defendants, pursuant to that agreement, and the right of the defendants, resulting from the default of the plaintiff, to sell the stock, upon reasonable notice to the plaintiff in person, of the time and place of sale.

The questions made as to the admissibility of evidence, are wholly immaterial in view of the facts found by the referee, as the testimony objected to and admitted under objection, even if technically inadmissible, could not have affected the result.

There is no error in the record, and the judgment must be affirmed with costs.

All concur.

Judgment affirmed.

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118 244

PRISCILLA C. HUTCHINGS, Appellant, *v.* JULIUS T. MINER, Respondent.

Where a policy of insurance upon the life of one is made payable to and held by another, but is so held in whole or in part for the benefit of the insured, or of whomsoever he shall designate, the insured has the power to revoke *pro tanto* the authority of the holder, or to change the conditions of the holding, and to annex to it new conditions. And if the insured suffers it to remain in the possession of the holder, upon his promising to pay a debt of the insured out of the avails of the policy when collected, this is a valid consideration for the promise; and the creditor for whose benefit it was made, although having no knowledge of it at the time, can affirm and enforce it.

So, if no direct promise was made by the holder, if the insured made the request to and laid the duty upon him, and he did not decline, or offer to give up the policy or the interest of the insured therein, but retains it and receives the whole amount, his consent is to be presumed, and it is equivalent to an express promise.

(Argued November 13th, 1871; decided November 20th, 1871.)

Statement of case.

APPEAL from a judgment of the General Term of the Supreme Court in the eighth judicial district, entered upon an order denying motion for new trial, and directing judgment in favor of defendant.

The complaint in this action alleges, that plaintiff lent to Henry B. Burt $518.60, to secure the payment of which Burt procured a policy of insurance on his life for $1,000, payable to the defendant. That on the day of his death, Burt directed the defendant to pay the plaintiff so much of the insurance money, as would be sufficient to pay her debt against Burt.

That defendant then promised Burt that he would so pay the plaintiff.

That Burt died on the 8th day of January, 1868. That the insurance money was afterwards paid to the defendant, of whom the plaintiff demanded the payment of her said debt, which was refused.

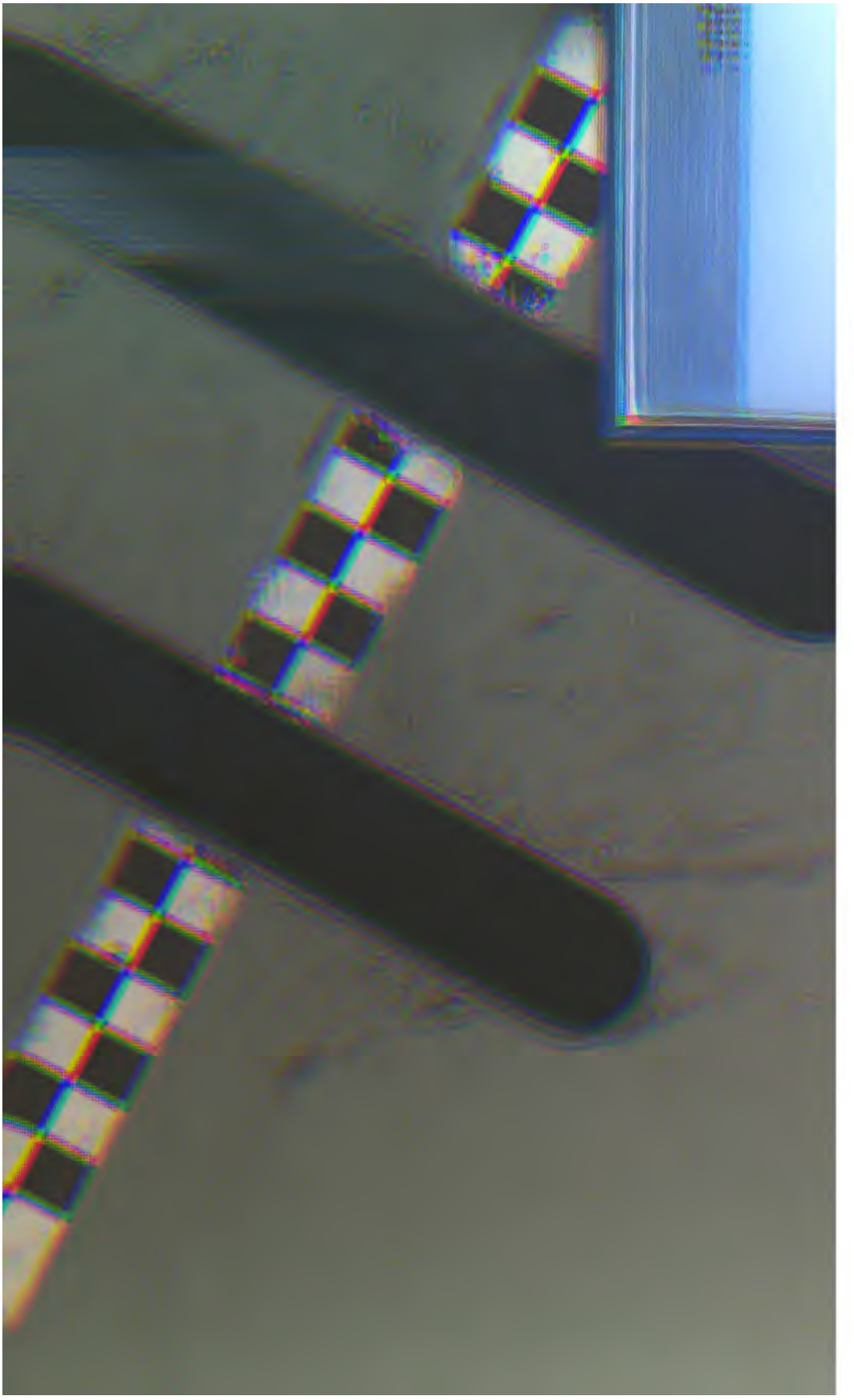
The answer admits, that defendant received of Burt the policy of insurance as alleged in the complaint, and that he received of the insurance company on said policy the sum of about $900, and denies every other fact in the complaint contained.

The plaintiff on the trial of the cause gave evidence, proving that she lent to Burt the sum of $518.60 at the time, and in the manner stated in the complaint.

That after the defendant had received the money on the policy, she demanded of him that he should pay her said debt, which he refused to do. And gave evidence, tending to prove, that when Burt delivered said policy to defendant, he informed defendant that the policy was for the purpose of securing and paying such debts as the one he owed the plaintiff. And gave evidence tending to prove that Burt, in his last sickness, the last day of his life, directed the defendant to pay the plaintiff's demand out of the insurance money, and that defendant promised Burt that he would so pay her.

The court nonsuited the plaintiff.

B. H. Austin, Jr., for appellant. An action lies on a promise made by the defendant, upon valid consideration, to a third person for the benefit of the plaintiff. (*Lawrence* v.



ant, but for the use of Burt as well. There was also testimony given which tended to show, that it was taken out to meet from the avails of it, any pecuniary obligations incurred by Burt, without their being defined or specified as to amount, or kind, or owner, further than that they were such as this of the plaintiff; and that Burt had borrowed small sums of the defendant. And the testimony tended to show, that the defendant was also charged by Burt, with the duty of expending some of the avails upon Burt's lot in the graveyard. Had the case been given to the jury, it would have been for them to have determined just what the conditions were, under which the policy was made payable to the defendant, and was held by him.

If the jury had found that the conditions were such that the defendant held it, in whole or in part for the benefit of Burt, or for the benefit of whomsoever Burt should designate, it was in the power of Burt to revoke *pro tanto*, the authority given by him to the defendant, and to change to such extent the conditions of his holding, and to annex to his holding new conditions, and then to name to whom a portion of the avails of it should be paid. We are not to say that they might not have so found. Had the jury gone so far, then there was testimony tending to show that Burt, while he had such power to recall it from the defendant, and to make of it other disposition, did nevertheless permit it to remain in the possession of the defendant, on his promise to Burt to pay from the avails of it, enough to satisfy to the plaintiff her unpaid note of $500, made to her by Burt. And this would be in legal effect, the same as if Burt had then originally committed it to the defendant for that purpose, on receiving from him that promise. (*Williams* v. *Fitch*, 18 N. Y., 546.) It is true that the testimony of the witness, Mr. Box, who alone speaks to an express promise, is not positive as to it, and gives only his best recollection. But this a jury may consider and ponder as they see fit.

But if the jury from his testimony would not have found an express promise, there was other from which they could

have found that Burt made the request to, or laid the duty upon the defendant, that out of the avails of the policy he should thus pay the plaintiff; that having the policy in his hands, subject to the power in Burt to recall it or an interest in it therefrom, and in other hands to devote it to the object of his intense desire, the defendant listened to the request, did not decline to accede to and carry it out, did not offer to give up the policy or any interest in it, but retained it and received upon it nearly the whole amount of it. From this the jury could presume, that he assented to the terms on which it was left, in effect put, in his possession and control. (*Berly* v. *Taylor*, 5 Hill, 577; *Hall* v. *Marston*, 97 Mass., 575.) Such conduct on his part, if found by the jury, was equivalent to an express promise made to the plaintiff. (*Weston* v. *Barker*, 12 J. R., 276.)

Had the jury gone thus far, the defendant would be found by them coming into the possession of a fund, under an agreement with Burt based upon a valid consideration, to hold the same until available; and when availed of, to pay over the same for the benefit of the plaintiff. She could then, though the agreement was made without her knowledge at the time of its making, affirm it and enforce it against him. (Com. Dig. Action on Case. Asst. B., 15; *Neilson* v. *Blight*, 1 Johns, Cas., 205, cited in *Cumberland* v. *Codrington*, 3 J. C. R., 261; *Weston* v. *Barker*, *supra*.) And this she could do in an action at law. (Cases last cited.)

This case would then fall within the principle laid down in *Lawrence* v. *Fox* (20 N. Y., 268), and recognized and approved in many cases since that was decided. (*Secor* v. *Lord*, 3 Keyes, 525; *Van Schaick Exr's* v. *Third Ave. R. R.*, 38 N. Y., 346; *Burr* v. *Beers*, 24 N. Y., 178; *Freeman* v. *Auld*, 44 N. Y., 55), to wit: where A for a valid consideration promises B to pay C, C may maintain an action on the promise, though not privy to the consideration.

The testimony tended too, to make a case such as appears in *Williams* v. *Fitch*, *supra*. Here, as there, the defendant was in possession of property of an owner, which might have

been recalled from him, and other disposition made of it. In consideration that it was not so recalled and otherwise disposed of, he promised to the owner that he would hold it for the benefit of another. Here, as there, the defendant held the funds in question, upon a trust, for the benefit of that other, who was consequently entitled to recover them. In that case an action at law for money had and received to the use of the plaintiff was sustained.

Of course, all that we have said is subject to the qualification, that the jury would have found from the testimony a state of facts, such as we have assumed they might have done. If the defendant had been put to his defence, the testimony might have been materially varied.

If the jury had thus viewed the testimony, they would have found a valid agreement, *inter vivos*, by which the owner of a contract set aside a portion of the probable avails of it, to the payment of a lawful debt against him.

It was in no sense a testamentary disposition, nor a *donatio mortis causa*. Nor does a question arise under the statute of frauds. (*Farley* v. *Cleveland*, 4 Cow., 432.) Nor would any rights of administrators of the owner's estate intervene between the plaintiff and the fund. Nor would the action of the defendant in fulfilling his agreement, by collecting and receiving the avails of the policy and paying to the plaintiff the amount of her note, be hampered necessarily by any question as to the proper disposition of what remained after she was paid. The testimony tended to show, that at first Burt was desirous that all the indebtedness against him, or more than that of the plaintiff, should be paid by the defendant from the avails of the policy. But that on perceiving their insufficiency therefor, his mind fixed upon the payment of the note of the plaintiff as a prime purpose. Now, whatever the claims of the defendant against Burt, for which he could insist that the policy was pledged, so far as appears from the testimony, they were not so large as that the payment of them would not leave of the fund a sum over $500. It was then, when the defendant was paid the sum of $900

Statement of case.

upon the policy, as if there were set apart in his hands enough of that to pay the plaintiff's note, to which no one else, so far as the testimony tends to show, had any claim. And if after that amount was set apart there was a residue, it was held by him, subject to any legal claim of Burt's creditors or personal representatives.

The judgment of the court below should be reversed, and a new trial ordered with costs to abide the event of the action.

All concur.

Judgment reversed.

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46 462
164 334

WILLIAM R. STURGESS, Respondent, *v.* AMOS A. BISSELL, Appellant.

In an action against a common carrier, for a failure to transport and deliver goods in accordance with his contract, the measure of damages is the value of the goods at the place of destination, at the time they should have been delivered pursuant to the contract, and in the condition the carrier undertook to deliver them, less the price to be paid for his services.

In such an action, a letter from plaintiff's agent, who made the contract for him, directed to and received by defendant, in which letter the agent stated the contract, as he claimed it to be, was offered and received in evidence.—*Held*, the evidence was competent and properly received.

One of plaintiff's witnesses was permitted to state, under objection, a conversation between plaintiff and one W., the book-keeper of defendant, and acting as his agent in the shipment of freight; no material evidence was given. Subsequently the same witness testified, without objection to a conversation with W., a portion of which was competent as a part of the *res gestæ*, and a portion incompetent.

Held, that as conversations with W., pertaining to business transacted by him at the time, were competent, and as error is never to be presumed, but must be made plainly to appear, it is to be assumed the court in overruling objection to first question only intended to hold, that conversations with W., relating to business then being transacted, were competent, and that the objection then taken could not be made applicable to the subsequent incompetent evidence. If the ruling of the court was intended to apply to all conversations, the objection, to avail defendant, should have been more specific, so that the intent would be made plainly to appear.

(Argued November 15th, 1871; decided November 30th, 1871.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court of the eighth judicial district, affirming judgment in favor of plaintiff entered upon verdict of a jury.

The action is brought to recover the value of 630 barrels of apples shipped by plaintiff upon defendant's boat, to be transported to the city of New York. The defendant agreed to deliver the apples uninjured by frost, and, if frozen, to pay the damages. The contract was made between John H. Crane, agent of plaintiff, and the defendant. The apples were shipped November 16th, 1867. The apples were frozen when the boat arrived at Syracuse. The boat was finally stopped by ice in the canal at Fort Plain, December 4th, 1867. The apples were forwarded by railroad to New York, but in consequence of the freezing were a total loss. Upon the trial on the question of damages, plaintiff proved, under objections, the value of the same kind of apples in the New York market at the time of their arrival.

A letter written by Crane to defendant, and received by him, dated November 26th, 1867, which letter set forth the contract of shipment, as claimed by plaintiff, was offered in evidence and received under objection.

Upon the examination of Crane as a witness for plaintiff, he was asked as to a conversation between plaintiff and one Wakeman, a book-keeper of defendant and his agent, in matters relating to shipment of freight. Counsel for defendant objected to any evidence of conversation in the absence of defendant. Objection overruled and exception. The conversation detailed was, in substance, an objection on the part of plaintiff to ship by canal. Subsequently witness was asked as to another conversation with Wakeman, which occurred the next day after the first. No objection was made, and witness testified, in substance, that plaintiff demanded a bill of lading in accordance with the agreement, threatening to remove the apples unless it was given; that Wakeman admitted the contract as claimed by plaintiff, and promised to make out such a bill as plaintiff required; asked plaintiff to write on a card what he wanted inserted, agreeing to forward

the bill to plaintiff on Monday thereafter; that a card was given to Wakeman as desired, upon which was written the following: "Freight, fifty cents; insurance against freezing, five cents. Guaranteed to be delivered in New York within thirty days from date of bill of lading."

The jury rendered a verdict in favor of plaintiff for $3,185.52; upon which, judgment was duly perfected.

A. P. Lanning, for appellant. That the letter of plaintiff's agent, Crane, written after the making of the contract, was improperly received in evidence. (*Thallheimer* v. *Brinckerhoff*, 4 Wend., 394; *Moore* v. *Meacham*, 10 N. Y., 207; Dunlop's Paley on Agency, 270, and note.) Proof of value of apples in New York city, was improper upon question of damages. (*Marchesseau* v. *Merchants' Ins. Co.*, 1 Rob. La., 438; *Leroy* v. *United Insurance Co.*, 7 John., 40, 343; *Lamont* v. *Chatham Insurance Co.*, 1 Hull, N. Y. Sup. C. T., 45.) Evidence of conversation between plaintiff and defendant's book-keeper improper. (Phillips on Evidence, pp. 100, 101; *Thallheimer* v. *Brinckerhoff*, 6 Con., 89; *Baptist Church* v. *Brooklyn Fire Insurance Co.*, 28 N. Y. R., 153.)

Farnell & Brazee, for respondent. That evidence of conversation between plaintiff and defendant's book-keeper was proper. (Story on Agency, §§ 126, 127, and notes, § 132.) All communications between the parties to the action, or their authorized agents in regard to the matter in controversy, were competent. (Phil. Ev. C. H. and E., notes, 4th ed., p. 172; *James* v. *Parshall*, 35 How., 472; *Murphy* v. *Baker*, 2 Rob., 1; *Moore* v. *Hamilton*, 48 Barb., 120.) The market value of the apples in New York, proper on question of damages. (*Marshall* v. *N. Y. C. R. R.*, 45 Barb., 502.)

GROVER, J. The contract of the defendant, as found by the jury, was to transport the apples from Lockport to New York, and deliver them to the plaintiff there, free from any injury from frost. This contract was broken by the defend-

ant. The apples were never delivered at New York, but frozen and rendered worthless upon the boat in which they were being carried, near Fort Plain, and which was there stopped by the freezing of the canal. The damage sustained by the plaintiff from the failure to perform this contract, was clearly the value of the apples in New York at the time they should have been delivered, pursuant to the contract, in the condition the defendant undertook to deliver them, less the price to be paid for the service. That was the benefit the plaintiff would have derived from the performance of the contract. Nothing less will indemnify him for the loss sustained. The contract was entire to transport the apples free from any injury from frost. Permitting their destruction by freezing was a violation of this contract by the defendant, and the plaintiff is entitled to recover all the damages sustained, by the failure to deliver them in New York according to the contract. The authorities cited by the counsel for the appellant, determining the measure of damages in insurance cases, have no application to the present case. The letter written by Crane at New York, and sent to and received by the defendant, was competent evidence. Crane was the agent of the plaintiff in respect to the shipment of the apples. He made the contract with the defendant for the shipment. The letter stated the contract as he claimed it. And this statement, with the answer of the defendant, if any, was equally competent as if made by him orally to the defendant, together with the reply of the defendant, if any. It was for the jury to determine what weight, if any, should be given to the evidence. It is insisted by the counsel for defendant, that evidence of conversations had by the plaintiff and Crane with Wakeman, was improperly received. Wakeman was bookkeeper for defendant, and acted as his agent in many respects in relation to the shipment of freight. This did not make his declarations or conversations with others, disconnected with business transacted by him for the defendant at the time, competent evidence against the defendant. If this rule was violated to the prejudice of the defendant, the judgment must

be reversed. Crane testified that he and the plaintiff went to the defendant's office. The defendant was not there, but Wakeman was. That the plaintiff had a conversation with Wakeman, in which Sturgess said he was opposed to shipping by canal, preferred to ship by rail. The counsel for the defendant objected to any evidence of the conversation between the plaintiff and Wakeman, defendant not being present, which was overruled and exception taken. No material evidence was given at this point, under this ruling. Subsequently the same witness testified to another meeting of the plaintiff and Wakeman the next day, at which Wakeman handed the plaintiff a bill of lading for the apples, which the plaintiff refused to receive. The reasons assigned by the plaintiff for this refusal, explanatory of the act, were competent, as part of the *res gestæ* transacted between the plaintiff and Wakeman, as agent for the defendant. Some further testimony was given as to what Wakeman said about his understanding of the contract, which had been made between the defendant, personally, and Crane, as agent for the plaintiff, which was incompetent, but no objection was made to such testimony. The counsel now insists, that the objection made to the testimony as to the conversation on the day previous, should be held applicable to this testimony. But that objection and the ruling thereon, does not show that the court held all conversations with Wakeman competent. My understanding of it is, that the court only intended to hold such conversations competent, when relating to business being transacted by Wakeman for the defendant at the time. So understood, the ruling was correct. If the ruling was really intended otherwise, the objections should have been more specific. Error must not be presumed but plainly made to appear, to warrant the reversal of a judgment. The judgment appealed from must be affirmed, with costs.

All concur.

Judgment affirmed.

SAMUEL P. WHITE, Respondent, *v.* JOHN W. CORLIES and JONATHAN N. TIFFT, Appellants.

In order to constitute an agreement, there must be a proposition by the one party accepted by the other; and when the parties are not together, the acceptance must be manifested by some appropriate act, and the manifestation put in the proper way of reaching the proposer; a mere mental determination to accept, not indicated by speech, or put in course of indication by act, is not an acceptance. Nor does an act, which in itself, is no indication of acceptance, become such because accompanied by an unevinced mental determination.

Plaintiff, a builder in New York, received from defendants the following note: "Upon an agreement to finish the fitting up of offices 57 Broadway in two weeks from date, you can commence at once." No reply was sent, but plaintiff immediately purchased lumber for the work and began to prepare it. The next day the note was countermanded.

Held, that the purchase of, and work upon the lumber were not acts indicative to defendants of acceptance, as they were as appropriate for any other like work, and made no binding contract between the parties.

(Argued November 17th, 1871; decided November 20th, 1871.)

APPEAL from judgment of the General Term of the first judicial district, affirming a judgment entered upon a verdict for plaintiff.

The action was for an alleged breach of contract.

The plaintiff was a builder, with his place of business in Fortieth street, New York city.

The defendants were merchants at 32 Dey street.

In September, 1865, the defendants furnished the plaintiff with specifications, for fitting up a suit of offices at 57 Broadway, and requested him to make an estimate of the cost of doing the work.

On September twenty-eighth the plaintiff left his estimate with the defendants, and they were to consider upon it, and inform the plaintiff of their conclusions.

On the same day the defendants made a change in their specifications and sent a copy of the same, so changed, to the plaintiff for his assent under his estimate, which he assented to by signing the same and returning it to the defendants.

On the day following the defendants' book-keeper wrote the plaintiff the following note:

"NEW YORK, *September 29th.*

"*Upon an agreement* to finish the fitting up of offices 57 Broadway in two weeks from date, you can begin at once.

"The writer will call again, probably between five and six this P. M.

"W. H. R.,
"For J. W. CORLIES & Co.,
"32 Dey street."

No reply to this note was ever made by the plaintiff; and on the next day the same was countermanded by a second note from the defendants.

Immediately on receipt of the note of September twenty-ninth, and before the countermand was forwarded, the plaintiff commenced a performance by the purchase of lumber and beginning work thereon.

And after receiving the countermand, the plaintiff brought this action for damages for a breach of contract.

The court charged the jury as follows: "From the contents of this note which the plaintiff received, was it his duty to go down to Dey street (meaning to give notice of assent), before commencing the work?"

"In my opinion it was not. He had a right to act upon this note and comence the job, *and that was a binding contract between the parties.*"

To this defendants excepted.

L. Henry, for appellants. The manifestion of assent must be such as tends to give notice to proposing party. (*Mactiers* v. *Frith*, 6 John., 103; *Vasser* v. *Camp*, 11 N. Y., 441.)

Mr. Field, for respondent. Not necessary that the fact of concurrence by one party should be made known to the other. *Mactiers* v. *Frith*, 6 Wend., 103, 117.) An agent acting, apparent authority binds the principal. (Story on Agency,

§ 443; *Clark* v. *Metropolitan Bank*, 3 Duer, 241; *Mechanics' Bank* v. *N. H. R. Road*, 13 N. Y., 599; *Farmers' and Mechanics' Bank* v. *B. and D. Bank*, 16 N. Y., 125; *Dunning* v. *Roberts*, 35 Barb., 463; *Cornell* v. *Maston*, 35 Barb., 157; *Witbeck* v. *Schuyler*, 44 Barb., 469.)

FOLGER, J. We do not think that the jury found, or that the testimony shows, that there was any agreement between the parties, before the written communication of the defendants of September thirtieth was received by the plaintiff. This note did not make an agreement. It was a proposition, and must have been accepted by the plaintiff before either party was bound, in contract, to the other. The only overt action which is claimed by the plaintiff as indicating on his part an acceptance of the offer, was the purchase of the stuff necessary for the work, and commencing work, as we understand the testimony, upon that stuff.

We understand the rule to be, that where an offer is made by one party to another when they are not together, the acceptance of it by that other must be manifested by some appropriate act. It does not need that the acceptance shall come to the knowledge of the one making the offer before he shall be bound. But though the manifestation need not be brought to his knowledge before he becomes bound, he is not bound, if that manifestation is not put in a proper way to be in the usual course of events, in some reasonable time communicated to him. Thus a letter received by mail containing a proposal, may be answered by letter by mail, containing the acceptance. And in general, as soon as the answering letter is mailed, the contract is concluded. Though one party does not know of the acceptance, the manifestation thereof is put in the proper way of reaching him.

In the case in hand, the plaintiff determined to accept. But a mental determination not indicated by speech, or put in course of indication by act to the other party, is not an acceptance which will bind the other. Nor does an act, which, in itself, is no indication of an acceptance, become such,

because accompanied by an unevinced mental determination. Where the act uninterpreted by concurrent evidence of the mental purpose accompanying it, is as well referable to one state of facts as another, it is no indication to the other party of an acceptance, and does not operate to hold him to his offer.

Conceding that the testimony shows, that the plaintiff did resolve to accept this offer, he did no act which indicated an acceptance of it to the defendants. He, a carpenter and builder, purchased stuff for the work. But it was stuff as fit for any other like work. He began work upon the stuff, but as he would have done for any other like work. There was nothing in his thought formed but not uttered, or in his acts that indicated or set in motion an indication to the defendants of his acceptance of their offer, or which could necessarily result therein.

But the charge of the learned judge was fairly to be understood by the jury as laying down the rule to them, that the plaintiff need not indicate to the defendants his acceptance of their offer; and that the purchase of stuff and working on it after receiving the note, made a binding contract between the parties. In this we think the learned judge fell into error.

The judgment appealed from must be reversed, and a new trial ordered, with costs to abide the event of the action.

All concur, but Allen, J., not voting.

Judgment reversed, and new trial ordered.

Henry McCord, Plaintiff in error, *v.* The People, Defendants in error.

The design of the statute against obtaining money, etc., under false pretences, is to protect those, who for an *honest* purpose, are induced by false and fraudulent representations to give credit or part with their property, and not to protect those, who do this for unworthy or illegal purposes.

When, therefore, the indictment charged that the prisoner falsely or fraudulently represented he had a warrant against M., and thereby induced him to deliver up to prisoner a watch and diamond ring.

Statement of case.

Held, that the property must have been parted with, as an inducement to a supposed officer to violate the laws and his duties, and the indictment could not be sustained. (Peckham, J., dissenting.)

(Argued November 18th, 1871; decided November 20th, 1871.)

Error to the General Term of the Supreme Court in the first department to review judgment, affirming judgment of the Court of General Sessions in and for the county of New York, convicting the plaintiff in error upon an indictment for false pretences.

The plaintiff in error, Henry McCord, was tried and convicted in the Court of General Sessions of the Peace, in and for the county of New York, at the June term, 1870, upon an indictment charging in substance, that with intent to cheat and defraud one Charles C. Miller, he falsely and fraudulently represented:

"That he, the said Henry McCord, was an officer attached to the bureau of Captain John Young's department of detectives, and that he had a warrant, issued by Justice Hogan, one of the police justices of the city of New York, at the complaint of one Henry Brinker, charging the said Charles C. Miller with a criminal offence and for his arrest; and that the said Henry Brinker had promised him, the said Henry McCord, $200 for the arrest of him, the said Charles C. Miller."

And that said Miller, believing such false representations, was induced to and did deliver to McCord a gold watch and a diamond ring.

H. C. Allen and W. T. Kintzing, for plaintiff in error. The indictment does not set forth any offence. (*People* v. *Thomas*, 34 N. Y., 351; *People* v. *Stetson*, 4 Barb., 151; *The People* v. *Williams*, 4 Hill, 9; *The People* v. *Clough*, 17 Wend., 351; *The People* v. *Thomas*, 34 N. Y. Rep., 351; *Young et al.* v. *R.*, 3 Term R., 98; Wharton Am. Cr. Law, 2 vol., 5th ed., 2081.) The statute was only to protect from frauds in commercial dealings. (*People* v. *Clough*, 17 Wend., 351.)

S. B. Garvin, for the people. If any one pretence is false, to which persons of ordinary caution would give credit, it is sufficient. (*People* v. *Haynes*, 11 Wend., 557; *People* v. *Thomas*, 34 N. Y., 351; *People* v. *Hewett*, 13 Wend., 87; *People* v. *Ainslie*, 4 Den., 529.) The question is one of fact for a jury. (34 N. Y., 352; *Reff* v. *People*, 2 Parker, 139; Whar. Cr. Law, 2131.)

Per Curiam. If the prosecutor parted with his property upon the representations set forth in the indictment, it must have been for some unlawful purpose, a purpose not warranted by law. There was no legitimate purpose to be attained, by delivering the goods to the accused, upon the statements made and alleged as an inducement to the act. What action by the plaintiff in error was promised or expected in return for the property given, is not disclosed. But whatever it was, it was necessarily inconsistent with his duties as an officer, having a criminal warrant for the arrest of the prosecution, which was the character he assumed. The false representation of the accused was, that he was an officer and had a criminal warrant for the prosecutor. There was no pretence of any agency for, or connection with any person, or of any authority to do any act, save such as his duty as such pretended officer demanded.

The prosecutor parted with his property as an inducement to a supposed officer, to violate the law and his duties; and if in attempting to do this he has been defrauded, the law will not punish his confederate, although such confederate may have been instrumental in inducing the commission of the offence. Neither the law or public policy designs the protection of rogues in their dealings with each other, or to insure fair dealing and truthfulness, as between each other, in their dishonest practices. The design of the law is to protect those who, for some honest purpose are induced, upon false and fraudulent representations, to give credit or part with their property to another, and not to protect those who, for unworthy or illegal purposes, part with their goods.

(*People* v. *Williams*, 4 Hill, 9; *Same* v. *Stetson*, 4 Barb., 151.)

The judgment of the Supreme Court and of the sessions must be reversed and judgment for the defendant.

Peckham, J. (dissenting.) Although this case was tried and the defendant convicted in the court below after a plea of not guilty, he has not presented for review anything that occurred on the trial. The whole question arises upon the indictment, whether any offence is charged therein.

The review of the indictment comes up after verdict, when every defect that evidence might aid is presumed to have been cured by proof. (*Thomas* v. *The People*, 34 N. Y., 351; *R.* v. *Hamilton*, 9 Ad. and Ell., N. S., 271.)

It is alleged that the prisoner could not have obtained the property by these pretences, if false, unless the party gave them in settlement of a felony, and being thus guilty of a crime, the law would not listen to his complaint.

Upon this record it is the duty of this court, to presume that there was no error at the trial, if a case can be supposed where there would be none.

The charge is, that the prisoner obtained these things by these false pretences. The manner of obtaining them is not set forth, as it need not be. (*Hamilton* v. *Regina*, 9 Ad. & El., 271.) The particular crime charged against the complainant is not stated. The term "crime," when used in any statute, means any offence for which any criminal punishment may, by law, be inflicted. (2 R. S., 702, § 32.)

That is also a good definition of the word as used at common-law. (1 Bouv., 410), and cases cited.

We may say that the prisoner claimed and pretended to have a warrant against the complainant for an alleged assault and battery; was about to arrest him just at night, take him to the jail or station-house (a very uncomfortable place apart from its perils), but was willing to take this property as security for the complainant's appearance the next morning to answer the complaint, or that he represented himself as

authorized by the complainant, to settle the charge for such an amount, and the complainant herein delivered this property as security therefor. In either instance a case is made out.

The party charged may be entirely innocent. He may have been the injured and the assailed, but his adversary had him at a disadvantage. The complainant, timid and credulous, is thus defrauded out of his property. Is the prisoner in such case guilty of no crime? Is the complainant in such case beyond the pale and protection of the law?

Again, there are few men, believing that they would be locked up on such a charge, in such a place, unless they did so, who would hesitate to advance considerable property as security for their appearance in the morning. And it would be an extreme position for the courts to take, that he had thus and thereby put himself beyond the protection of the law; that the villain who had thus obtained this property with the intent to defraud, was guilty of no offence. That so far as the law could act he was a good citizen, and was obtaining his livelihood in a legal, if not in a praiseworthy manner.

It would seem to be enough, so far as such a case is concerned, to observe that no such exception, as is here sought to be taken, is found in the statute against obtaining property by false pretences; and in my judgment neither principle, authority or public policy requires the courts to insert it.

No offence would have been committed by the complainant in this case had the settlement been made as supposed.

Hence, this does not conflict with *The People* v. *Stetson* (4 Barb., 151). There the settlement of a felony was substantially alleged, showing that the complainant was guilty of a misdemeanor thereby, and in parting with his property; and hence the indictment, could not be sustained. That I believe is the only case that declares such doctrine. Many a weak and innocent man would have imitated the complainant in that case, rather than had a charge of such a character made against him before the public. In truth, the complainant in that case was guilty of no crime whatever in what he did, as

the whole thing against him was a fiction. But the principle seems to be, to hold him guilty in order to shield the villain who put him in so terrible a dilemma.

But if an offence were committed by the party defrauded in advancing the money, or would have been, if the pretenses were true, how does that discharge the offence committed in obtaining it? How absolve the offender?

This statute, it should be borne in mind, is not solely for the relief of the party defrauded. Its purpose is to punish a public offence, to punish and to prevent fraud, and to protect the weak and credulous.

Where both parties to a civil suit are equally guilty of a felony, out of which the action arises, the law refuses its aid to either. It leaves them where it finds them. This rule has no application to criminal proceedings; the complainant is no party to that proceeding. The people are the party prosecuting, not the complainant. There is no ground for that rule in a criminal case, and there is no such rule.

It would not seem to be an answer to say, that there was another offender requiring punishment.

In truth, there could be no other offender, upon the supposition that the pretences were false, that there was no warrant and no right to arrest, no offence to settle, and none, in fact, settled. The whole thing being a sham.

The statute does not except such a case from punishment. One purpose of this statute was to protect the weak and the credulous. The statute against usury was passed to protect the weak and the necessitous. Yet the latter statute could not be violated unless the complainant, the party injured, participated in the crime. No man can be guilty of usury unless some one pays, or agrees to pay it. Why should the false pretender be discharged any more than the usurer, because another participated in the crime?

The Supreme Court of this State, I say it with great respect, once put an exception in our statute not placed there by the legislature; that a false pretence, whereby charity was obtained, was not within the meaning of the statute, though

plainly within its language. It seems to be settled the other way in *England R.* v. *Jones* (T. & M., 270). (4 New Sess. Cas., 353; 1 Den. C. C., 551; 3 C. & K., 346; 14 Jur., 533; 19 L. J. M. L., 162; 4 Cox C. C., 198.)

The recital preceding the English statute, that evil disposed persons had obtained goods by false pretences, "to the great injury of industrious families, and to the manifest prejudice of trade and credit," was referred to as showing that only trade and commerce were sought to be protected, and their invasion only were within the denunciation or penalty of the act, though this recital was never adopted here. (*The People* v. *Clough*, 17 Wend., 351.)

This made it necessary for the legislature to strike this exception out again, and they did so by an act passed in 1851. (Laws of 1851, p. 268.) Now the act in terms applies to all, the virtuous and the vicious, to "industrious," and to idle families alike.

The law is well settled, that if A assault B and knock him down without any excuse; yet if B should then beat A in an outrageous manner, he would be liable even to a civil action, though A had first committed a crime in the first assault.

If the law would allow a civil remedy to a person thus confessedly guilty of crime in making an unprovoked assault, would it not permit an offender against the public, the false pretender, to be punished for the public offence? Although, if the pretences had been true, he would have induced another, also, to commit an offence in advancing the money.

This indictment, as before stated, is not merely to protect or relieve this party cheated, but to protect the public against such a criminal. If the other party had committed a crime, there would be no objection to punish him also. (*Com.* v. *Morrill*, 8 Cush., 571.)

An indictment, much like the one at bar, was sustained in the Supreme Court of Pennsylvania. It was at first quashed in the lower court; but on review, was sustained in an opinion of Judge Woodward. (*Carn.* v. *Henry*, 10 Harris, 253.)

There the indictment charged, that the prisoner claimed to have a warrant for the arrest of the complainant's daughter, for an alleged crime punishable by fine and imprisonment; and that he threatened to arrest her, and thus obtained the property of her father. The complainant was held to be within the protection of the law, and the indictment sustained.

The false pretences in this case are within the plain language of the statute. The offence is committed, and I do not think the complainant has done any act to discharge it or to put himself beyond the law's protection. I am, therefore, against a repeal of the statute, and for affirming the conviction.

For reversal, CHURCH, Ch. J.; ALLEN, GROVER, FOLGER and RAPALLO, JJ.

For affirmance, PECKHAM, J.

Judgment reversed.

THE PEOPLE ex rel. JOSIAH B. BLOSSOM et al., Respondents, *v.* HOMER A. NELSON, Secretary of State, Appellant.

A corporation cannot be formed, under the act for the incorporation of benevolent, charitable, scientific, and missionary societies (chapter 319, Laws of 1848), except for some or one of the purposes therein named. The right to file a certificate in the office of the Secretary of State, by which a body politic and corporate is to be *ipso facto* created, only exists in behalf of those who bring themselves within the terms of the act.

A corporation for business purposes, having in view pecuniary gain and profit to the corporators, does not come under this act, although it may contemplate the promotion of the temporal interests of others.

The consent and approbation of a justice of the Supreme Court required by the act, is but one of the conditions precedent to the right to file the certificate, and is neither conclusive upon the public nor upon the Secretary of State, who is not required to file a certificate unauthorized by the act.

(Argued November 14th, 1871; decided November 21st, 1871.)

APPEAL from an order of the General Term of the Supreme Court in the third department, reversing an order made at

Special Term denying an application for a mandamus. (Reported below, 3 Lansing, 394; 10 Abb. Pr. U. S., 200.)

A mandamus was applied for, to compel the defendant to file a certain certificate, for the incorporation of the "Mutual Reliance Society," on the claim, that it was within the "Act for the incorporation of benevolent, charitable, scientific and missionary societies," passed 12th April, 1848, and the acts amendatory thereof.

The certificate stated: "That the object for which the said society is formed is benevolent; by the association and co-operation of its members, by their contributions and the contributions of others, to provide a relief fund; also to aid persons of moderate pecuniary resources in obtaining from a reputable insurance company insurance on their lives, and in maintaining the necessary payments on the same; and to secure to families of persons so insured an immediate advance of funds in case of death." The certificate is signed by eight persons, and was acknowledged by them on the 8th of April, 1871. The principal office of the society is in the city of New York; and there is attached to the certificate the following: "I consent to and approve of the filing of the within certificate," which is signed by one of the justices of the Supreme Court of the first judicial district. The certificate was presented to the Secretary of State on the 14th day of April, 1871, and he refused to file it in his office.

A. J. Parker, for appellant.

W. P. Prentice and J. H. Reynolds, for respondents. That under Laws of 1848, chapter 319, relators had a right to file the certificate. (*The People* v. *Taylor*, 1 Abb. N. S., 200; *The People* v. *Minor*, 37 Barb., 466; *Ex parte, Calvin Goodell*, 14 John., 325; *The People* v. *Mead*, 24 N. Y., 119; *The People* v. *Common Council, etc.*, 20 How., 491; *In re Life and Fire Ins. Co. of N. Y.* v. *Wilson's Heirs*, 8 P., 291; *The People* v. *Mitchell*, 45 Barb., 208; *The People* v. *Martin*, 58 Barb., 286.) No discretionary or judicial power

is given to Secretary of State in reference to such certificates. (*The People* v. *Supervisors of Schenectady*, 35 Barb., 408; *The People* v. *Mitchell*, 45 Barb., 208.) The incorporators have done all the law required. (*The People* v. *Minor*, 37 Barb., 446; *The People* v. *Mitchell*, 45 Barb., 208; *The People* v. *Supervisors of Schenectady*, 35 Barb., 408, esp. pp. 423. 426.) The decision of the justice of the Supreme Court, who approved of this certificate, cannot be collaterally reviewed by the Secretary of State or by a clerk of the court. (*People* v. *Collins*, 19 Wend., 56; *The People* v. *Supervisors, etc.*, 5 Cow., 292; *Supervisors of Onondaga* v. *Briggs*, 2 Den., 26, 34, 36; *The People* v. *The Contracting Board*, 33 N. Y., 382; *The People* v. *Halsey*, 37 N. Y., 344; *The People* v. *Attorney-General*, 22 Barb., 114; *Ex parte Johnson*, 3 Cow., 371; *The People* v. *Mitchell*, 45 Barb., 208; *The People* v. *Martin*, 58 Barb., 286.) For violation of law by this corporation, the law itself will have a remedy. (2 R. S., 605, Edm. ed.; *The People* v. *Utica Ins. Co.*, 15 Johns., 358.)

PER CURIAM. The act for the incorporation of benevolent, charitable, scientific and missionary societies (chap. 319 of the Laws of 1848), authorizes any five or more persons, who shall desire to associate themselves "for benevolent, charitable, literary, scientific, missionary or mission or other Sabbath school purposes, to make, sign and acknowledge and file in the office of the Secretary of State, and also in the office of the clerk of the county in which the business of such society is to be conducted, certificates in writing, stating the name by which the society shall be known, the particular business and objects of such society, the number of trustees, etc., and declares that, upon filing such certificate, the persons who shall have signed and acknowledged the same, and their associates and successors, shall thereupon be a body politic and corporate," etc.

A corporation cannot be formed under this act, except for some or one of the purposes named in it, and the right to file

a certificate in the office of the Secretary of State, by which a body politic and corporate is to be *ipso facto* created, only exists in behalf of those who bring themselves within the terms of the act, and do in fact associate themselves for some of the benevolent, literary or religious objects contemplated.

The Secretary of State is not required to file a certificate for the organization of a corporation not authorized by the act.

A compliance with the act, as well in substance, by associating for one or more of the authorized objects, as in form, by signing and acknowledging a proper certificate, stating the facts required, is a condition precedent to the right of the associates to avail themselves of the act, and place the certificate on file.

The object and purposes of the "Mutual Reliance Society," as set forth in the certificate of association, are clearly not among those specified in the act, and for which corporations may be created under it. It is evidently a corporation for business purposes, having in view pecuniary gain and profit to the corporators. It may contemplate the promotion of the temporal interests of others, but such object is merely incidental to the chief end of the association. The consent and approbation of a justice of the Supreme Court, required by the act, as but one of the conditions precedent to the right to file the certificate, and is cumulative to the other requisites of the act, but decides nothing, and is not conclusive either upon the public or the Secretary of State. The relators have not established a right to file this certificate under the act for the formation of benevolent, charitable, literary or religious societies, and the Secretary of State was justified in declining to file the same. It did not properly belong to the records of his office.

The order of the General Term must be reversed, and that of the Special Term affirmed, with costs.

CHURCH, Ch. J., ALLEN, GROVER and PECKHAM, JJ., concur; FOLGER, J., dissents; RAPALLO, J., not voting.

Order reversed.

ISAIAH S. WILLIAMS, Respondent, *v.* ROBERT SARGEANT, Appellant.

This court has no authority to correct any supposed errors of a jury in the assessment of damages.

The declarations and admissions of a party to the record, of any fact material to the issue, are competent evidence against him, although they are inconsistent with and tend to contradict the testimony of other witnesses called by the adverse party.

If there are any reasons for the exclusion of evidence competent in itself, growing out of the proceedings upon the trial, or the prior examination and statements of the witness, they must be pointed out and the attention of the court called to them; a general objection is insufficient. It is within the discretion of the judge at the trial, to allow a witness to be recalled and to explain, qualify, or contradict his former statements, and his decision cannot be reviewed.

Argued November 16th, 1871; decided November 20th, 1871.)

APPEAL from the judgment of the General Term of the Supreme Court of the first judicial district, affirming a judgment in favor of plaintiff entered upon the verdict of a jury.

The action is brought to recover for three horses alleged to have been fraudulently converted by defendant. The jury found the fraud, and gave a verdict for the highest valuation of the horses. Upon the trial, plaintiff called defendant's wife as a witness, who swore that she never saw one of the horses, a pony; subsequently he proved by another witness, that defendant said his wife had been riding the pony for about a year in Brooklyn. This was objected to by defendant upon the ground, that plaintiff could not contradict his own witness. Objection overruled and exception.

One of plaintiff's witnesses, upon his examination in chief, testified, that he never heard defendant say anything about having sold the pony; the same witness was subsequently recalled, and was again asked if he had ever heard defendant say anything about having sold the pony. Defendant objected generally. Objection overruled and exception. Witness answered

that defendant stated that he sold him for $400. Defendant moved for a nonsuit which was denied.

H. Whittaker, Jr., for appellant. There was no evidence to sustain the complaint, and the refusal to nonsuit was error. (*Deyo* v. *N. Y. C. R. R.*, 34 N. Y., 9, 13; *Fellows* v. *Northrup*, 39 N. Y., 117, 119.) One cannot rescind without tendering back what he has received. (*Stevens* v. *Hyde*, 32 Barb., 171, and cases cited; *Matteawan Co.* v. *Bentley*, 13 Barb., 641; *Fisher* v. *Conant*, 3 E. D. Smith, 199; *Rosenbaum* v. *Gunter*, id., 203; *Goelth* v. *White*, 35 Barb., 76; *Nichols* v. *Michael*, 23 N. Y., 264, 267, 272, and cases cited; *King* v. *Fitch*, 1 Keyes, 432, 452, and cases cited.) The verdict should be set aside as against evidence. (*McDonald* v. *Walter*, 40 N. Y., 551, 553; *Lomer* v. *Meeker*, 25 N. Y., 361.) The damages were excessive; the rule of damages is a fair question of law, and as such cognizable by this court. (*McDonald* v. *Walter*, 40 N. Y., 551, 553; Sedgwick on Dam., 5th ed., 545.)

S. Hand, for respondent.

ALLEN, J. This court cannot correct any supposed errors of the jury in the assessment of damages. It is not unlikely that the jury, believing that a gross and deliberate fraud had been perpetrated by the defendant, awarded a very liberal indemnity to the plaintiff, and had the Supreme Court thought the damages excessive, that court might have corrected the error, but no such discretion rests with us. There was no error in the admission in evidence of the declarations of the defendant, as to a fact material to the issue, although such declarations were inconsistent with and tended to contradict the testimony of the wife of the defendant, who had been called as a witness in behalf of the plaintiff. The declarations and admissions of a party to the record, of any fact material to the issue, are always competent evidence against him. (*Marvin* v. *Richmond*, 3 Denio, 58.) And although

a party may not impeach or assail the credibility of his own witness by general evidence, or by showing that he had previously made statements inconsistent with his testimony, he may prove on the merits by independent testimony, the truth of a particular fact in direct contradiction to the testimony of the witness. (*Thompson* v. *Blanchard*, 4 Comst., 303.)

The objection to evidence of the declaration of the defendant, that he had sold the pony for $400, which was a material fact, was general, a naked objection without a statement of any grounds for it, or reasons for excluding the evidence. The testimony was competent in itself, and if there were any reasons for its exclusion, growing out of the proceedings upon the trial, or the prior examination and statements of the witness, they should have been stated, and the attention of the court called to them. The objection was insufficient in form, but if all the reasons alleged here had been properly assigned on the trial, the exception taken to the admission of the evidence could not have been sustained. It was within the discretion of the judge at the trial, to permit a witness to be recalled to a fact in respect to which he had before testified, and to explain, qualify or contradict his former statements, and the discrepancy in the statements only affects his credibility. A court of review cannot revise or reverse the decision of the judge at the trial, in a matter properly resting in his discretion. (*Wright* v. *Wilcox*, 9 C. B., 650; *People* v. *Cook*, 4 Seld., 67.) There was no error in refusing the motion for a nonsuit. The plaintiff had given evidence tending to prove the cause of action; that the defendant, while acting as the agent and friend of the plaintiff, had falsely pretended to have disposed of the horses, and upon such representations had induced the plaintiff, to yield his claims and assent to the disposals thus claimed to have been made, when in truth the defendant had converted the horses to his own use or sold them for large prices. No error was committed by the court to the prejudice of the defendant with the jury, and if he has

suffered at the hands of the jury, he has no redress in this court. The judgment must be affirmed.

All concur.

Judgment affirmed.

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HIRAM WOOD, Respondent, *v.* MICHAEL D. LAFAYETTE, Appellant.

A dispute having arisen between plaintiff, defendant, and others, in regard to the location of the boundary lines of a lot of land owned by defendant, an agreement in writing to compromise and settle the same was entered into by all the parties, one provision of which was that M. should go upon the land and designate the line between plaintiff and defendant, as the same existed when M.'s father occupied the lot. Defendant offered proof of revocation upon his part of M.'s authority to locate the line, and also proof of actual location of the line, both of which were rejected.

Held, that the agreement was a valid and binding one, and fixed as the true line between the parties, the one that existed and was recognized when M.'s father occupied the premises, and left only the question to be determined as to the location of that line. But that M. was simply empowered to act as arbitrator upon this question, and as such his power was revocable. That the question should have been submitted to the jury to determine the location of the line, and that the rejection of the testimony, both as to revocation and location, was error.

(Argued November 16th, 1871; decided November 20th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming judgment entered upon verdict in favor of plaintiff, and also order denying a new trial.

This action arose in justice's court. It was for trespass in entering upon plaintiff's land, cutting down trees, etc. Defendant plead title and gave the requisite undertaking, and the action was, thereupon, brought in the Supreme Court. The parties owned lands adjoining. Defendant's land was formerly owned and occupied by James Mann, father of the James Mann referred to in the agreement hereinafter mentioned.

Statement of case.

Upon the west the defendant joined lands with James Connor. The defendant, before the commencement of this action, removed the line fences between his lands and the lands of the plaintiff, and lands of Connor, and placed the west line fence further west upon Connor's land, and the north line fence further north upon plaintiff's land. The strip of land in dispute is twenty-four links in width, and extends across the defendant's farm. Connor soon after removed the fence placed on his lands, and on the 17th day of September, 1866, the defendant brought an action against him therefor, which action was removed to the Supreme Court upon a plea of title being interposed. The plaintiff and Jonathan Whiting were the grantors by warranty of the lands owned by Connor in dispute.

A dispute also arose between the plaintiff and defendant, at the time the defendant removed the north line fence upon the plaintiff's land, as to the location of the boundary line between them.

On the 17th day of January, 1867, the plaintiff, defendant, Connor and Whiting entered into an agreement, providing for the settlement of the above action, and of all disputes as to the location of the defendant's boundary lines.

The portions of the agreement affecting this case are quoted in the opinion.

The defendant entered upon the land in dispute, and severed timber of the value of fifty dollars, and this action was brought to recover damages therefor.

Upon the trial the defendant offered in evidence a written notice directed to all the other parties to the agreement, signed by him, stating in substance that he revoked all power and authority given to James Mann, to locate or designate the boundary line between him and plaintiff. To this plaintiff's counsel objected generally, and the same was excluded and defendant excepted.

Mann did go on and locate the line as plaintiff claimed it. Defendant offered to prove that the line designated by Mann was not the line as it existed when his father occupied the

lot, but that the latter line was where defendant claims it; which offer was overruled and evidence excluded, and defendant excepted. The jury found a verdict for defendant for fifty dollars.

J. H. Reynolds, for appellant. Plaintiff proved no possession of the *locus in quo*, and the verdict should be set aside as unsupported by evidence. (*Gardner* v. *Hart*, 1 Comst., 528; *Allhouse* v. *Rice*, 4 E. D. Smith, 347; *Kelley* v. *Valentine*, 21 How., 228; *Hill* v. *Draper*, 10 Barb., 450; *Vosburgh* v. *Teator*, 32 N. Y., 561; *Pratt* v. *Frost*, 5 Seld., 403; *Rathbone* v. *Staaten*, 6 Barb., 141; *Holmes* v. *Seeley*, 19 Wend., 507; *Frost* v. *Duncan and Murphy*, 19 Barb., 560; *Algio* v. *Duncan*, 39 N. Y., 313; *Hotaling* v. *Hotaling*, 56 Barb., 194.) Where boundary line is rendered certain by the deed, it cannot be changed by executory agreement or arbitration. (*Clark* v. *Withory*, 19 Wend., 320; *Jerry* v. *Chandler*, 16 N. Y., 354.) As the agreement fixes the line, it cannot be contradicted by proof. (*Stebbins* v. *Cooper*, 4 Denio, 191; *Dun* v. *Hewett*, 2 Denio, 637.)

S. Hand, for respondent. The agreement was to settle an uncertain and disputed boundary, and was binding. (*Vosburgh* v. *Seaton*, 32 N. Y., 567; *Baldwin* v. *Brown*, 16 N. Y., 359; *Ratcliffe* v. *Gray*, 3 Keyes, 573; *Reed* v. *Farr*, 35 N. Y., 113.) The agreement cannot be revoked save by consent of all parties. (*Union Manuf. Co.* v. *Lonsbury*, 42 Barb., 126, 141; *Hunt* v. *Singer*, 1 Daly 211 and 212; *Clarkson* v. *Mitchell*, 3 E. D. Smith, 270; *Rosenbaum* v. *Gunter*, id., 203.) Where error is relied on in excluding evidence, the case must show affirmatively it was relevant when offered. (*Van Amringe* v. *Barrett*, 8 Bosw., 373, 374; *Pratt* v. *Strong*, 33 How., 288.) The offer must be relevant and proper in all its parts or the decision excluding it will not be disturbed. (*Button* v. *McCauley*, 38 Barb., 417; *Jones* v. *Osgood*, 2 Seld., 235; *Haggart* v. *Morgan*, 1 Seld., 427, 428; *Caghlan* v. *Dinsmore*, 35 How., 419; *Magee* v. *Badger*, 34 N.

Y., 248.) Plaintiff's possession was assumed on trial, and defendant is estopped from disputing it. (*People* v. *Cook*, 4 Seld., 78; *Sipperly* v. *Stewart*, 50 Barb., 66; *People* v. *Hurlbutt*, 44 Barb., 132; *Page* v. *Fazackerly*, 36 Barb., 396; *Stewart* v. *Smith*, 14 Abb., 75; *Rosebrooks* v. *Dinsmore*, 36 How., 138; *Manice* v. *Brady*, 15 Abb., 173; *Cheney* v. *Beals*, 47 Barb., 526; *People* v. *Third Ave. R. R. Co.*, 45 Barb., 66.) If plaintiff had been out of possession, upon being restored he was entitled to recover for intermediate injuries. (*Van Deusen and others* v. *Young*, 29 Barb., 9, 18; *Dewey* v. *Osborn*, 4 Cow., 338; *Morgan* v. *Varick*, 8 Wend., 594; *Schamerhorn* v. *Buell*, 4 Denio, 425; *Rockwell* v. *Saunders*, 19 Barb., 481.) A new trial will not be ordered when the facts proved are conclusive, and it is seen they cannot be changed. (*Brown* v. *Bowen*, 30 N. Y., 519, 541, 542; *Johnson* v. *Hathorn*, 2 Keyes, 476, 484, 485.)

GROVER, J. The case shows, that there was a *bona fide* dispute between the defendant and Connor, in respect to the true west boundary of the defendant's forty acre lot, and also between the plaintiff and defendant in respect to the north boundary of the defendant's lot; that Jonathan Whiting was the defendant's grantor of the premises with covenants of warranty; that a suit was pending in the Supreme Court between the defendant and Connor, involving the question as to the west boundary; that for the purpose of settling this suit and the entire controversy as to west and north boundary lines, and also the amount to be paid by Whiting to the defendant, in satisfaction for the breach of the covenants in his deed to the defendant; Connor, defendant, plaintiff who owned the lands adjoining the forty acres on the north, and Whiting, entered into a written agreement, by which the action of the defendant against Connor, was settled upon the following terms as therein stated: "Jonathan Whiting agrees to procure a competent surveyor to go upon the land occupied by the plaintiff (the defendant in the present case), and make a survey thereof, commencing at the south-east corner thereof

in the center of the highway; thence running west fifteen chains on a line of some marked trees, and on the line, which, if continued, will strike a stake and heap of stones about twenty-five links beyond; thence north on a line parallel with the aforesaid highway twenty-six chains and sixty-seven links; thence east fifteen chains to the center of the highway; thence south twenty-six chains and sixty-seven links along the center of said highway to the place of beginning. That after such survey the parties agrees that James Mann shall go on to the land and designate the line between Mr. Lafayette and Hiram Wood on the north end of the Lafayette lot, as the same existed when his father occupied the Lafayette lot, and particularly that he shall put a stake and stones, or other monument at the northern corner of the lot, so as to mark the boundary thereof. That so much of the land first described as the line so fixed by said Mann as above specified, shall cut or take off therefrom, the said Whiting agrees to pay Lafayette therefor at the rate of thirty dollars an acre." Connor and Wood both agreed that Lafayette might move the fences and place them upon the lines so fixed; and the parties further agreed with each other that the lines so ascertained by the survey and modified by Mann, as above provided, shall be and remain the boundaries of Lafayette's lot. This agreement was valid and binding upon the parties. Where there is a disputed, indefinite, or uncertain boundary line between adjoining proprietors, they may, by parol agreement, or by arbitration, fix upon a line between themselves. (*Vosburgh* v. *Teator*, 32 N. Y., 561.) By this agreement it is obvious that the west line of the defendant, dividing his land from Connor, was fixed and determined. It was the line, determinable by a correct survey, made pursuant to the agreement. There was nothing to be done by the parties thereafter that could change this line. Had the surveyor employed by Whiting made an inaccurate survey, the line run would not have been the boundary, but would have been subject to correction by an accurate survey. The line was fixed by the agreement, and although its precise location was

not known to the parties until ascertained by an accurate survey, yet the parties were bound by it, and each had title up to it under the agreement. The survey was only necessary to furnish evidence as to where it was. In respect to the north line of the forty acres, the agreement fixed as the true line the one that existed and was recognized as the line while the witness, Mann's father, owned and occupied the forty acres of the defendant. The agreement gave to each party title to that line, but they differed as to where it was. For the purpose of settling this question the agreement provided, that it should be determined by Mann, whose father had owned and occupied the forty acres for a great number of years. Had Mann determined the same pursuant to the agreement, there is no question but that the parties would have been concluded thereby upon this question of fact, and the plaintiff's right to recover for the trespass established. But the defendant's counsel offered in evidence a paper executed by the defendant, revoking his authority to determine the question. This was rejected by the court upon a general objection of the plaintiff, to which the defendant excepted. It is said in the points of the plaintiff's attorney, that the offer did not embrace proof of service upon the plaintiff, but no such objection was made upon the trial; had there been, it probably would have been obviated. It was the natural mode, first to prove the paper and then service upon the other parties. It must be assumed that the court held the power of Mann irrevocable. In this I think there was error. He was empowered under the agreement, to decide where the existing line was while the lot was occupied by his father. This was by the agreement fixed and established as the true line. The only remaining question was to determine where this line was; this the parties agreed to submit to Mann, and to abide by his decision. This was the only matter with which he had anything to do; everything else was settled by the agreement. In determining where the line was, Mann was to act as arbitrator; his power so to act was revocable by either party, as is the case in every submission to arbitrators,

if exercised at the proper time. The fact that there was a consideration for the agreement, in the settlement of the existing suit, makes no difference in this respect. Every agreement to arbitrate must, to be valid, be based upon a consideration, the amount of such consideration is not material. The agreement to submit the question to Mann was the only part revocable by either party; his power having been revoked, his subsequent determination was not binding upon the parties. The line as it existed while his father occupied the lot under the agreement was made the boundary, but its location should have been submitted to the jury upon the evidence. The plaintiff gave evidence which, unexplained or uncontradicted, entitled him to a verdict, that it was identical with the blank line claimed by him. But the defendant offered to prove that this was not the line, but that the line then existing was where the fence was at the time of the trial, which was the line claimed by the defendant, and which would give to him the strip in dispute. This evidence ought to have been received, and the question decided by the jury. The value of the land in dispute is less than twenty dollars. It is much to be regretted that so serious a litigation should originate from such a small affair; but the question must be decided the same as if affecting important rights. The judgment appealed from must be reversed, and a new trial ordered.

All concur.

Judgment reversed.

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SQUIRE P. COLLINS, Respondent, *v.* WILLIAM S. BENNETT, Appellant.

A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property, in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur, without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence.

Statement of case.

Defendant took the horse of plaintiff to board, with instructions not to use him; he did use him and the horse was foundered. Plaintiff abandoned the horse and brought suit for conversion. Defendant brought suit in justice's court for the board of the horse; in that action the plaintiff herein in his answer set up the conversion. This was demurred to, and the justice sustained the demurrer, holding that it was no defence, and a recovery was had for the amount of the claim. Defendant, by supplementary answer, pleaded this former adjudication in bar.

Held, that the remedy for the erroneous decision of the justice, should be sought in that suit; that the recovery therein necessarily adjudged a performance of his contract by the defendant, and that there was no conversion. The judgment, therefore, was a bar.

(Argued November 16th, 1871; decided November 20th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court of the second judicial district, affirming a judgment in favor of plaintiff entered upon a verdict, and also affirming an order denying motion for new trial.

This is an action for wrongful conversion of plaintiff's horse, which had been intrusted to defendant to keep and care for.

Answer admits defendant took the horse to keep for compensation, and interposes a general denial of the remainder of the complaint; and by leave of court subsequently set up the plea of a former suit in bar.

The following facts were proved: The delivery of the horse to defendant to be kept and cared for, December 15th, 1866; that the horse was in good condition at the time defendant received him, and so remained till in March, 1867; that plaintiff gave express instructions to take off the horse's shoes, and not to use him, and to give him only such exercise as he could give him by leading him around with a halter, and to let him go barefooted all winter; that defendant violated plaintiff's instructions, by keeping the horse shod, and by using him himself, and by allowing his wife to use him; the horse was foundered and rendered worthless, while in defendant's possession, and when asked to account for it, defendant at first denied having used him, but finally confessed he had, and had allowed his wife to drive him, and had put him in

the stable over night all right, and found him in that condition in the morning; that finding the horse worthless, plaintiff abandoned him on the 1st June, 1867; that this suit was commenced 22d May, 1867; on the 20th June, 1867, defendant had commenced an action against Collins, for the board of the horse before a justice; Collins sought to interpose the pendency of this action in bar to that action; also, that Bennett, by reason of the violation of his compact, could not recover; these portions of the answers were demurred to, etc; the demurrer was sustained; the defence was excluded, and judgment was rendered by the justice against the plaintiff here, for the board of the horse to the 14th of June, 1867, at the contract price. The court charged herein, that the burden of proof was upon defendant, if the horse was sound when received by him, to show that he took reasonable and ordinary care, to which defendant's counsel excepted.

The court also charged, that the defence of a former adjudication was not made out, to which defendant's counsel also excepted.

The jury rendered a verdict in favor of plaintiff for $200.

J. H. Bergen, for appellant. The court erred in charging, that burden was upon defendant to show due care. (*Watson* v. *Bauer*, 4 Abb., U. S., 273; *Curran* v. *W. C. & M. Co.*; Transcript Appeals, Jan., 1867, p. 59.) The former adjudication a complete defence. (*Aurora City* v. *West*, 7 Wall., 82, 96, 97, 100; 2 Taylor's Evidence, § 1513; *Henderson* v. *Henderson*, 3 Hare, 115; 9 Wendell, 287; 1 Wait., Law. & Pr.; 1 Phil. Ev., 223; *Royce* v. *Burt*, 42 Barb., 655; 6 Abb. Dig., 276, § 12, p. 278; § 21; *Coburn* v. *Woodworth*, 31 Barb., 381; *Davis* v. *Talcott*, 12 N. Y., 184; *Booth* v. *Burt*, 17 Abb., 349; S. C., 43 Bar., 384.)

E. A. Doolittle, for respondent. The judgment of the justice no bar. (9 Abbott P. R., 164; 14 Abbott P. R., 206; *Halsey* v. *Carter*, 1 Duer, 667; see Code, page 225, note b; *Gillespe* v. *Torance*, 25 N. Y.,

306; *Booth* v. *Burt*, 17 Abb., 349; *Bellinger* v. *Ford*, 14 Barb., 250; *Rockwell* v. *Perrin*, 5 Barb., 573; *Yager* v. *Hamilton*, 6 Hill, 631; 5 Denio, 436; Code, page 225, note c; 21 How., 130; 22 Barb., 146; *Foster* v. *Milner*, 50 Barb., 385; *Lowe* v. *Davis*, 13 John., 227; 12 Wend., 504; *Doty* v. *Brown*, 4 Com., 11; *Burrell* v. *Knight*, 51 Bar., 267; *Many* v. *Havens*, 2 Johns., 24; 1 Espinas, 43; 3 Wills, 308; 2 Hill, 481; 6 Term R., 607; 2 Johns., 227; 16 Johns., 136; *Davis* v. *Talcott*, 14 Barb., 611; 2 Hill, 478; *Greenleaf* v. *Butt*, 9 Peters, 292; *Parks* v. *Ross*, 11 How., U. S. R., 362; *Dean* v. *Howitt*, 3 Wend., 257; *The People* v. *Cox*, 4 Seld., 67, 78; *Burdeck* v. *Post et al.*, 12 Barb., 168; *Davis et al.* v. *Talcott et al.*, 14 Barb., 611; *Burrell* v. *Knight*, 51 Barb., 267; *Smith* v. *Weeks*, 26 Barb., 463; *Sweet* v. *Tuttle*, 4 Kern., 465; *Mallett* v. *Foxcraft*, 1 Story, 6 Ct., 474; *Hopkins* v. *Lee*, 6 Wheat., 109; 2 Abbott Nat. Digest, p. 546, §§ 8, 9, 10.) It was incumbent upon defendant to show due care. (*Arent* v. *Squire*, 1 Daly, 347; *Smith* v. *N. Y. C. R. R.*, 43 Bar., 225; 12 Abb., 227.) Defendant should have requested the questions of fact to be submitted to the jury. (*Barnes* v. *Perrin*, 2 Kern., 18; *Bidwell* v. *Lamont*, 17 How., 357.)

PECKHAM, J. Two questions are urged in this case: First. Was the burden upon the defendant, of proving that he took reasonable and proper care of the horse in keeping him, provided the jury was satisfied that he was sound when he was received by the defendant? Second. Was the recovery for his keeping a bar to this action?

Under the proof, there was no error committed by the court as to the first point. There was sufficient and uncontradicted proof of conversion. The defendant took the horse to board on the 14th of December, 1866, at twenty dollars a month, and kept him, as he alleged, and boarded him, until the 14th of June, 1867. He took him, as the uncontradicted evidence shows, with express directions from the plaintiff, the owner, "not to use him or harness him in any way." Yet the defendant both rode and drove the horse, and there is

strong ground to believe, that he foundered him in such use. Whether he did or not is of no moment to inquire. He converted the horse to his own use, when he drove him and rode him, and was liable to an action for such conversion. The plaintiff abandoned the horse to the defendant in May, 1867, and then prosecuted him for his conversion. There was no dispute in regard to this evidence, and a conversion was thereby clearly proved, and no question could therefore arise as to the burden of proof. (*Fish* v. *Ferris*, 5 Duer, 49, and cases cited.) But assume that the injury to the horse is the basis of the action, and I think the rule as to the burden of proof is the same.

The charge is, that if the jury find, that the horse was sound when delivered to defendant, the *onus* is on him of showing that he took proper care of him, and was not guilty of negligence that caused the injury.

Here it will be observed, this horse was in the exclusive possession of the defendant. He had charge and care of him for hire. During that charge he is injured in a way that ordinarily does not occur without negligence; usually not without the horse has been used and then been neglected. This may be safely said on the evidence and upon human experience. In such case the burden rests with the custodian, to show how the injury occurred, and that he was not guilty of the negligence that caused it. (Story on Bail., §§ 406, 411; citing Sir Wm. James & Pothier, 3 Keb., 135; *McDaniels* v. *Robertson*, 26 Verm., 340; *Curtis* v. *Railroad*, 18 N. Y., 544, per GROVER, J.; Ang. on Com. Car., § 266; *Roberts* v. *Riley*, 15 Louis. An. R., 103.)

This rests upon the defendant for two reasons. First. Because the facts are within the defendant's peculiar knowledge, and he should, therefore, prove them. Second. Such an injury does not usually occur, without negligence on the part of the custodian of the animal.

Was the trial and recovery in the justices' court a bar to this action? That suit was commenced on the 20th of June, 1867, and was instituted to recover for boarding the horse for

six months, terminating on the 14th of June, 1867, at twenty dollars per month, and for shoes five dollars. A credit of twenty-five dollars, for so much paid, was given, and a recovery was had for the claim as made. This plaintiff contested that suit, and sought to set up this conversion in bar; it was pleaded, demurred to, and the justice held it was no defence and overruled the defence.

Was that judgment a bar? It will be observed, that the recovery embraced the board of the horse, for about a month after the owner had abandoned him to this defendant, and after this suit was pending to recover for his value.

That judgment judicially established as between these parties, that this defendant still boarded the horse for this plaintiff after this suit was instituted, and that he had fulfilled the contract between the parties for boarding the horse; that he had boarded him with all proper care, and had not converted him to his own use.

If the defendant had converted him to his own use, or had abused the horse and seriously injured him, so that the plaintiff had notified him, that he abandoned the horse to the defendant, then clearly he would not be liable for board to the defendant thereafter, nor in fact at all. The recovery, therefore, necessarily adjudges that proper care was used, that the horse was not converted to defendant's use, and properly abandoned to him.

This defence of conversion was set up and substantially proved, but its effect was erroneously overruled by the justice. See cases below.

This case forms no exception to the rule that the judgment was a bar. If the defence that should legally have been allowed be improperly rejected, the relief is not by a new suit, but by a correction of that error in the same suit. (*Morgan* v. *Plumb*, 9 Wend., 287; *Sheldon* v. *Carpenter*, 4 N. Y., 579.)

I do not see but that a recovery by defendant would have had the same effect. (*Gates* v. *Preston*, 41 N. Y., 113; and see *Bouchaud* v. *Dias*, 3 Den., 238.) In that case the

Buffalo, and for a number of years had been occupied under a lease from Mr. Spaulding by Milo W. Hill, a brother of the plaintiff. Before the deed was executed a negotiation relative to the purchase of the premises was had between Milo W. Hill and Mr. Spaulding.

The referee found that the defendant, Lydia C. Grant purchased the premises of Mr. Spaulding, on a proposition made by him to her, to wit, to pay $1,000 on the delivery of the deed, and give her bond, secured by a mortgage on the premises, conditioned to pay another $1,000, with interest, on the first of May following, and the remaining $3,000 in three equal annual installments, with interest semi-annually; and stated to Milo W. Hill, "if he should by the first day of May then next, pay to her the $1,000 and interest she paid to Mr. Spaulding, and pay to Mr. Spaulding also the sum of $1,000, to become due on her bond and mortgage, on the first day of May, that then she would convey the property to him."

The referee further found that the defendant, Lydia C. Grant, performed her agreement with Mr. Spaulding, but neither the plaintiff nor his brother Milo agreed with her to purchase and pay for the property on any terms; and that they, under the privilege she extended to Milo W. till the first of May, neither paid nor offered to pay either to Mrs. Grant the sum of $1,000 paid by her to Mr. Spalding, nor to Mr. Spaulding the $1,000, which became payable on the first day of May, on the bond and mortgage given by Mrs. Grant to Mr. Spaulding.

The referee found that Milo W. Hill abandoned the expectation of purchasing the property; and instead thereof, he in May, 1865, took a lease from Mrs. Grant of some rooms in the second story of the building on the premises, which are described in the lease, as the same which had been lately purchased from Mr. Spaulding by Mrs. Grant.

The referee dismissed the plaintiff's complaint.

A. J. Parker, for appellant. If the deed was intended as between the parties to this action, as a security for a loan, it

will be decreed a mortgage, and parol evidence is admissible to show the intent. (2 Cow. Rep., 324; 19 Wend,, 518; 9 Wend., 227; 1 Paige Ch., 202; id., 48; 5 Paige Ch., 9; 4 John Ch. Repts., 178–218; 1 Sandford's Ch., 56; 4 Kent Comm., p. 172, Marg. p. 143; 8 Paige, 243, and note at bottom, 2d ed., and cases cited; also see 8 N. Y. Rep., 416; 15 N. Y., Rep., 374; *Morris* v. *Nixon*, 1 How., 118; 34 N. Y., 315; *Kellum* v. *Smith*, 33 Penn., 158; *Patterson* v. *Welling*, 3 Dallas, 506; 4 Kent, 141; 25 N. Y., 598.) An implied or resulting trust was created in favor of plaintiff, and she will be compelled to convey. (*Ryan et al.* v. *Day*, 34 N. Y., 307; 29 N. Y., 598.) Such a trust is not affected by the Revised Statutes. (2 R. S., 134, § 67; *Astor* v. *L'Amoreaux*, 4 Sand., 529.) In cases of fraud, courts of equity will relieve. (*Jenkins* v. *Eldridge*, 3 Story, 181.) Once a trust always a trust. (*Van Dusen* v. *Worrell*, 1 Irwin's Appeals, 224; *In re Greenfield's Estate*, 14 Pa., 489.) Plaintiff is entitled to specific performance, because there has been a part performance. (Fry on Spec. Per., 130–180; *Smith* v. *Onderdonk*, 1 Sand., 479; *Moore et al. v. Smedburgh*, 8 Paige, 600; 26 Wend., 288; *Lowry* v. *Tew*, 3 Barb. Ch., 407; *Parkhurst* v. *Van Cortland*, 14 J., 15.)

J. Ganson, for respondents. There being evidence tending to sustain findings of referee, they cannot be reviewed in this court. (*Ostrander* v. *Fellows*, 39 N. Y., 350; *Mason* v. *Lord*, 40 N. Y., 476.)

CHURCH, Ch. J. The decision of this case, depends upon the construction to be given to the report of the referee. If the facts found constitute the conveyance to Mrs. Grant a mortgage, according to established legal principles, the plaintiff is entitled to redeem, and the conclusion of law denying such right was erroneous. If, on the other hand, the true construction of the findings is, that Mrs. Grant made an absolute purchase of the property, and only a conditional sale by parol to the plaintiff or his brother Milo, then the conclusion

of the referee, that the plaintiff had no legal or equitable claim, was correct, and this court is bound to affirm it.

If the findings of a referee are ambiguous, that construction will be adopted, which will sustain the judgment, rather than that which will lead to a reversal. The rule is, that the findings are to receive the most favorable construction of which they are capable, for the purpose of upholding the judgment. Under this rule I am unable to see how this judgment can be disturbed.

The referee finds in effect, that the transaction was a parol conditional sale, and not a mortgage. It is true that the negotiations between Hill and Day commenced for a loan of money, and upon this being declined, Hill desired Mrs. Grant to take the deed as security; but the final arrangement, as the referee in substance finds, was that Mrs. Grant was to purchase the property, absolutely agreeing at the same time, that if Milo Hill would make certain payments by a specified time, she would convey the property to him. This accords with the other facts found. Neither the plaintiff nor Milo Hill ever owned this property, nor did either of them pay any part of the consideration. The $439 which Spaulding exacted, upon the sale by him, constituted no part of the consideration for the property, but was a debt due him from Milo Hill for rent and other liabilities. Mrs. Grant paid and secured the full value of the premises, and took immediate possession of, and managed the same as absolute owner. The transaction as found by the referee, and which the evidence warrants, was in substance this: Milo Hill was desirous of purchasing the property, whether for himself or the plaintiff, is immaterial. Spaulding was willing he should, but required him to perfect the purchase by the 1st of February, which he was unable to do, and he thereupon induced Mrs. Grant to become the purchaser, to enable him to have an extension of time, within which he might have the privilege of making the purchase. Mrs. Grant consented to purchase and give Hill an option, until the first payment became due. She occupied the same relative legal position to Milo Hill after the convey-

ance to her as Spaulding did before, and Mrs. Grant's agreement to convey upon certain conditions, did not constitute a mortgage any more than Spaulding's previous agreement did. This was evidently the view of the referee, and the findings are in harmony with it, and the evidence is sufficient to sustain the findings. The authorities cited by the learned counsel for the plaintiff are not, therefore, applicable to the established facts, but the case falls within the authorities relating to conditional sales. (*Holmes* v. *Grant*, 8 Paige, 243, and cases there cited.)

It is quite unnecessary to determine what equitable right to a specific performance of the parol agreement, Milo Hill or the plaintiff had or might have acquired. It is sufficient to say that any such right was forfeited and canceled, by the failure to perform the conditions, and by the voluntary abandonment of all claim under the agreement. The judgment must be affirmed.

All concur.

Judgment affirmed.

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HENRY AUSTIN, Respondent, *v.* NATHAN A. DYE, Appellant.

One having possession of personal property as a bailee for hire, with an executory and conditional agreement for its purchase, which conditions have not been performed, can give no title thereto to a purchaser, although the latter acts in good faith and parts with value, without notice of the want of title of his vendor. (*Ballard* v. *Burgett*, 40 N. Y., 314, followed; *Witts* v. *Green*, 36 N. Y., 556, questioned).

(Argued November 27, 1871; decided December 5, 1871.)

APPEAL from order of the General Term of the Supreme Court in the eighth judicial district, affirming an order of Special Term granting defendant a new trial. The facts are sufficiently stated in the opinion.

A. G. Rice, for appellant. That a *bona fide* purchaser for value, from a conditional vendee having possession, gets a

good title. (*Wyaits* v. *Green*, 36 N. Y., 556; *Smith* v. *Lyon*, 1 Seld., 41.) Taking a new note for a debt due is payment of a new and valuable consideration. (*Traders' Bank of Rochester* v. *Bradner*, 43 Barb., 379.)

A. J. Parker, for respondent. Morgan had no title to the cattle, and could confer none upon the defendant. (*Neidig* v. *Eifln*, 18 Abb. R., 353; *Strong* v. *Taylor*, 2 Hill, 326; *Herring* v. *Willard*, 2 Sandf., 418; *Herring* v. *Hopporh*, 15 N. Y. R., 409; *Ballard* v. *Burgett*, 47 Barb., 646; *Ballard and Simpson* v. *Burgett*, 40 N. Y., 413.) Defendant not a *bona fide* purchaser. (*Coddington* v. *Bray*, 26 John. R., 637; *Stalker* v. *McDonald*, 6 Hill, 93; 47 Barb., 29.)

ALLEN, J. The case, without setting out the evidence, states that the plaintiff proved that in October, 1866, he was the owner of the oxen in controversy, and that he agreed with Morgan to let him have the oxen for one dollar per day while in use, which Morgan agreed to pay. That at the same time it was agreed, that if Morgan should deliver to the plaintiff upon the bank of the Allegany river, a given quantity of hemlock boards within a specified time, the oxen should be the property of Morgan. That if he should not deliver the whole quantity, the plaintiff should take what he should deliver, at an agreed price per thousand, to be applied in payment for the use of the oxen. That the oxen were then delivered to Morgan, who did not deliver the full quantity of lumber agreed upon as the purchase price. The defendant claimed title under a mortgage upon the cattle given by Morgan. No question appears to have been made upon the trial as to the *bona fides* of the plaintiff in his dealings with Morgan, and the facts stated to have been proved, do not appear to have been controverted. The judge charged the jury, that if they found that the defendant took the mortgage for *bona fide* consideration then paid, and without notice of the plaintiff's interest in them, they should find for the defendant, to which the plaintiff excepted. A verdict was found for the defend-

ant; and from an order setting the same aside and granting a new trial the defendant has appealed. Upon the statement in the case of the facts as proven, and to which the parties have assented, there was no delivery of the cattle by the plaintiff to Morgan, with intent to pass the title and vest the property in the latter, either absolutely or conditionally. Morgan took possession of the oxen as bailee for hire, with an executory and conditional agreement for the purchase of them.

While, as a rule, an individual can transfer no greater interest in, or better title to property than he has, some exceptions have been engrafted upon the rule. Some of these exceptions are parts of the common-law, and are confined to negotiable instruments for the payment of money, and others reach the cases of property delivered by the vendor to the vendee, with intent to vest the title, although the conditions of the sale have not been fully performed; but this case is not within any of the exceptions. On the contrary, it is well established, that neither an ordinary bailee of property, nor one having possession under an executory agreement to purchase, can give a title thereto to a purchaser, although the latter acts in good faith, and parts with value without knowledge or notice of the want of title of his vendor, or that third persons have claims upon the property. The cases and authorities bearing upon the question were well considered in *Ballard* v. *Burgett* (40 N. Y., 314); and this court there held, in a case which cannot be distinguished from this by any circumstance favorable to the defendant, that one who purchases personal property from an individual, having possession under an executory agreement for the purchase, the conditions of which have not been performed, acquires no title as against the original owner, notwithstanding the purchase is made in good faith and in ignorance of the claim of the true owner. It is suggested that this is in conflict with *Wait* v. *Green* (36 N. Y., 556). There was an attempt to distinguish *Ballard* v. *Burgett* from *Wait* v. *Green*, but with what success it is not necessary to consider. There is a difference in the circumstance, but whether there is any distinction in principle is not

very apparent, and is not necessary to be determined here. This case is on all fours with *Ballard* v. *Burgett*; and that, as the latest utterance of the court, abundantly sustained upon principle and by authority, must be received as the law, and is decisive of this case.

The order appealed from must be affirmed, and judgment absolute for the plaintiff.

All concur.

Judgment affirmed.

THE BUFFALO CITY CEMETERY, Appellant, *v.* THE CITY OF BUFFALO, Respondent.

A rural cemetery association, incorporated under chapter 188, Laws of 1847, is the legal owner in fee of the lands, purchased for the purposes of the association.

One to whom a cemetery lot is conveyed for burial purposes, takes under the statute, simply a right to use it for those purposes. No such estate is granted, as makes him an owner in such sense, as to exclude the general proprietorship of the association.

In an assessment, therefore, for local improvements, it is proper to assess the whole premises to the association.

(Decided November 28, 1871.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, reversing a judgment in favor of plaintiff entered upon decision of the court at Special Term, and dismissing plaintiff's complaint.

This is an action brought by the Buffalo City Cemetery, for the purpose of having declared null an assessment upon its lands, levied by the defendant, to defray the expenses of a sidewalk, which the city had caused to be constructed on the south side of North street, and along lands owned by the plaintiff.

In 1868 the common council of the city of Buffalo directed a sidewalk to be laid on the south side of said street, between Main and Mariner streets. The sidewalk not being

laid by the owners of the lands fronting on the street, the common council subsequently took proceedings, under the charter, to construct the same, and caused said sidewalk to be laid, and caused to be made an assessment roll for the purpose of levying a tax, to defray the expense of laying said sidewalk. The plaintiff is a rural cemetery association, incorporated under chapter 133 of the Laws of 1847, and is the owner of some portion of the lands in front of which the sidewalk was constructed. It was assessed in said roll the sum of $566.40.

The lands assessed are owned and used by it for burial purposes only. Various subdivisions or cemetery lots had been sold by it to different persons, to be used as places of burial.

The court at Special Term held the assessment void, and granted an injunction restraining defendant from collecting.

S. Clinton, for appellant. The city had no right to assess the whole block to the cemetery. (Rev. Char., title 8, § 20; *Williams* v. *Village of Dunkirk*, 3 Lansing, 44.)

B. H. Williams, for respondent. Section 21 of charter, requiring a brief description of the several parcels of land, is directory. A precise compliance is not essential. (*Van Rensselaer* v. *Whitbeck*, 7 Barb., 137; *People* v. *Cook*, 8 N. Y., 67; *Cunningham* v. *Cassidy*, 7 Abb. Pr. R., 183; *U. S. Trust Co.* v. *U. S. Fire Ins. Co.*, 18 N. Y., 199; *People* v. *Allen*, 6 Wend., 486; *Merchant* v. *Longworthy*, 6 Hill, 646; *Know* v. *Village of Yonkers*, 39 Barb., 266; *Dawson* v. *People*, 25 N. Y., 399; *Van Vorhis* v. *Budd*, 39 Barb., 479; *People* v. *Supervisors of Ulster*, 34 N. Y., 268.)

FOLGER, J. In this case the appellant claims, that if it be held that the respondent had the right to assess the property of the appellant, yet it has not complied with the law in doing it. But one objection is urged, and it is stated upon the points of the appellant's counsel thus: "The assessment should have been upon the lands of the respective owners, by their known boundaries. The city had no right to assess the

whole block to the cemetery, who only owned a portion of it." As far as we can gather from the printed papers before us (from which are lacking certain plats or maps referred to in the complaint, and in the findings of the court), the owners, other than the appellant here indicated, are the persons to whom respectively, subdivisions of the whole tract of the appellant's land have been by it conveyed, to be held and used by them for burial purposes. The effect of such conveyance, under the statute from which the plaintiff derives its powers, is we suppose (for no copy of any conveyance is laid before us), no more than to confer upon the holder of a lot a right to use for the purpose of interments. No such estate is granted as makes him an owner in such sense as to exclude the general proprietorship of the association. The association remains the owner in general, and holds that relation to the public and to the government, while subject to this, the individual has a right exclusive of any other person to bury upon the subdivided plat assigned to him. He holds a position analogous to that of a pew holder in a house for public worship. It is a right exclusive of any other of the congregation, but subject to the right of the religious corporation, which represents the ownership of the property to the public, and is the legal owner of the fee of the property. This being so, we see no error made by the respondent in assessing the expense of the sidewalk to the whole property, and to the appellant as owner, by one description including the whole.

The other question involved is passed upon in the other case.

The judgment affected should be affirmed, with costs to the respondent.

All concur, except RAPALLO, not voting.

Judgment affirmed.

Statement of case.

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THE BUFFALO CITY CEMETERY, Appellant, *v.* THE CITY OF BUFFALO, Respondent.

Statutes conferring exemptions from taxation are to be strictly construed.

The provision of section 10, of the act providing for the incorporation of rural cemetery associations (Chap. 133 Laws of 1847), which exempts the lands and property of such associations, from "all public taxes, rates and assessments," does not apply to a municipal assessment to defray the expenses of a local improvement.

Public taxes, rates and assessments are those which are levied for some public or general use or purpose, in which the person assessed has no direct, immediate and peculiar interest. Those charges and impositions, which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, beneficial to the property especially assessed for the expense of it, are not public, but are local and private, so far as this statute is concerned.

(Decided November 28th, 1871.)

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, reversing a judgment in favor of plaintiff, entered upon the decision of the court at Special Term, and dismissing plaintiff's complaint.

This is an action brought by the Buffalo City Cemetery, for the purpose of having declared null an assessment upon its lands, levied by the defendant to defray the expenses of a sidewalk, which the city of Buffalo has caused to be constructed on Main street, in said city, and along lands owned by the plaintiff.

In 1868, the common council of the city of Buffalo directed a sidewalk to be laid on both sides of Main street between Delavan avenue and Steele street. The sidewalk not being laid by the owners of the lands fronting on the street, the common council subsequently took proceedings, under the charter, to construct the same, and caused said sidewalk to be laid, and caused to be made an assessment roll for the purpose of levying a tax to defray the expense of constructing said sidewalk. The plaintiff is a rural cemetery association, incorporated under chapter 133 of the Laws of 1847, and is

the owner of some portion of the lands in front of which the sidewalk was constructed. It was assessed in said roll the sum of $54.54. The lands assessed are held and owned for cemetery purposes only. The court at Special Term held the assessment void, and granted an injunction to restrain its collection.

S. Clinton, for appellant. Plaintiff's lands are exempted from assessment. (Laws of 1847, chap. 133, §10.) The word "public" only modifies "taxes," not "rates and assessments." (*Cushing* v. *Worrick*, 9 Gray, 382.) Statutes are to be so construed as to give meaning to each clause, sentence and word. (*James* v. *Dubois*, Harr., 285; *Hutchin* v. *Niblo*, 4 Blackf., 148; Op. of Justice, 22 Pick., 571; *Levisseur* v. *Reynolds*, 13 Iowa [5 Will.], 310.) Local assessments are not embraced under the term "taxes." (*Matter of Nassau St.*, 11 Johns., 77; *Sharp* v. *Spier*, 4 Hill, 76.) The intent of the legislature must govern in construing statutes. (31 N. Y., 289; *Rex* v. *London Gas Light Co.*, 8 B. & C., 54; *Rex* v. *Scott*, 3 D. & E., 602; *Edington* v. *Borman*, 4 D. & E., 4; *Regina* v. *St. Leonards*, 2 C. B., 347.) A private statute, giving an exemption, is not repealed by a subsequent general one, directing a tax in general terms. (4 D. & E., 2.)

B. H. Williams, for respondent. This assessment is not a public one, within the meaning of the act of 1847. (Greenl. Ev., 128; *Weeks* v. *Sparks*, 1 M. & S., 679, per BAYLEY, J.; *Shoalwater* v. *Armstrong*, 9 Humph., 222; *Fairfield* v. *Ratcliff*, 20 Iowa, 398; *In re Mayor, etc., of N. Y.*, 17 Johns., 77; 4 Zabriskie, 385; *Northern Liberties* v. *St. John's Ch.*, 13 Penn., 104; *Canal Trustees* v. *The City of Chicago*, 12 Ill., 403; *Mayor, etc., of Baltimore* v. *G. M. Cemetery*, 7 Md., 517; *S. U. Society* v. *City of Providence*, 6 R. I., 235; *Alexander* v. *Mayor of Baltimore*, 5 Gill, 396.) Exemptions from taxation to be strictly construed. (*Com. Council* v. *McLean*, 8 Ind., 328.) The city charter passed in 1853 is subsequent to the act, and if the two are repugnant, the

charter repeals the other. (See *Harrington* v. *Trustees Roch.*, 10 Wend., 547; Bac. Abr., tit. Statutes, D; *Ex parte Caruthers*, 9 East, 4; *Harcourt* v. *Fox*, 1 Shaw, 520; *Brown* v. *Osborne*, 2 Cow., 457; *Daviess* v. *Fairbaun*, 3 How. U. S., 643; *The Dexter and Limerick Plank Road Co.* v. *Allen*, 16 Barb., 15; *Milne* v. *Huber*, 3 McLean, 212.)

FOLGER, J. The defendant by its charter, is empowered to "cause * * * sidewalks * * * to be constructed, * * * and the expenses to be assessed upon the real estate of (the) city benefited by such improvement, in proportion to the benefits resulting thereto" (Laws, 1853, p. 447, chap. 230; 1856, p. 132, chap. 99, §§ 19, 30, title 8); and "all owners * * * in front of whose premises the common council shall direct sidewalks to be constructed * * * shall make (them) at their own costs; but if not done in the manner and * * * time prescribed, the common council may cause them to be constructed, * * * and assess the expense thereof upon the premises respectively."

The defendant having undertaken to exercise these powers upon the property of the plaintiff, it claims that it is exempt therefrom, by the provisions of the general statute under which it is incorporated. (Laws of 1847, chap. 133, p. 125.) That act exempts its lands and property from "all public taxes, rates and assessments." (§ 10.) From this, we can readily perceive, that the intent of the legislature was to relieve the property of this association from many burdens which other property bears; and from this and other provisions of the act, which debar the sale or application of it in payment of the individual debts of the associates, and which make inalienable under certain circumstances, the subdivisions of the lands, that the intent was to preserve the property against a forced diversion from the purposes for which it was acquired. But the recognition of this general intent will not warrant us in going beyond a fair interpretation of the particular language used to apply it to the details. Taxation is a burden. It is a common burden, for the common good. The person

or the class which is exempted therefrom is a favored one. A statute giving favors at the expense of the public is not to be liberally interpreted. Statutes conferring exemptions from taxation are to be strictly construed. (*Orr* v. *Baker*, 4 Ind., 86.)

Nor are we to be controlled in the disposition of this case, solely by the consideration, that the statute in its intent to preserve this class of property, for the particular use for which it is acquired and managed by the association, is in consonance with public policy and good morals. However repugnant to proper sentiment it may be to have such property the subject of sale by process, it is for the legislature to say how far that sentiment shall be regarded, and it is for the court to interpret and apply the language used to that end. Apt words are used in this enactment, to preserve the property from sale on execution or voluntary application for the payment of the debts of an associate and from being alienated by him. If there are not words, whose established meaning exempts from the usual municipal assessments, a new meaning cannot be given to those employed; and it must be inferred that it was not contemplated that the association would be endangered by such assessments, made as they generally are, and resulting as they sometimes do, for the benefit of the property.

The adjective "public," in the clause above quoted, applies to the nouns "rates" and "assessments," as well as to the noun "taxes." And the use of it limits the meaning, and implies that there were in the view of the framers of the statute, taxes, rates and assessments, other than those which it designates as public, and from which the plaintiff is not to be exempted. Be the meaning of the word "public," as used in this statute, the opposite of "private" or the opposite of "local," as is diversely contended, or the opposite of both, as may well be, still it must be that the legislature meant to limit its favor, and to imply that there were certain taxes, rates and assessments not public, from which the plaintiff was not to be exempted; and to these, whatever they are, the plaintiff is liable.

We think that the current of the authorities in this State and in some of the sister States runs to this result; that public taxes, rates and assessments, are those which are levied and taken out of the property of the person assessed, for some public or general use or purpose, in which he has no direct, immediate and peculiar interest; being exactions from him toward the expense of carrying on the government, either directly and in general, that of the whole commonwealth, or more mediately and particularly, through the intervention of municipal corporations; and that those charges and impositions which are laid directly upon the property in a circumscribed locality, to effect some work of local convenience, which in its results is of peculiar advantage and importance to the property especially assessed for the expense of it, are not public, but are local and private so far as this statute is concerned. (*The People* v. *The Mayor, etc.*, 4 Comst., 419; and cases there cited, p. 433, *et seq.*; *Fairfield* v. *Ratcliff*, 20 Iowa, 398; *City of Patterson* v. *The Society, etc.*, 4 Zabriskie, N. J., 385; *The North. Lib.* v. *St. John's Church*, 13 Penn. St. Rep., 104; *The Canal Trustees* v. *The City of Chicago*, 12 Ill., 403; *The Mayor, etc.*, v. *The Proprietors, etc.*, 7 Maryland, 517; *Le Fevre* v. *Mayor, etc.*, 2 Mich., 586.)

It is plain that the assessment of which the plaintiff complains falls within the last class, and is local and private. In our judgment, the exemption conferred by the act of 1847 does not relieve the plaintiff from it.

The judgment appealed from must be affirmed with costs to the respondent.

All concur, except PECKHAM, not voting.

Judgment affirmed.

Statement of case.

WILLIAM M. CLINTON, Respondent, v. CHARLES P. MYERS, Appellant.

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No riparian proprietor has a right to use the water of a stream to the prejudice of other proprietors above or below, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He may use the water while it flows over his land as an incident thereto, but he cannot unreasonably detain it, or give it another direction, but must return it to its ordinary channel when it leaves his estate.

A party has a right to erect a dam across a stream upon his land, and such machinery as the stream in its ordinary stages is adequate to propel, and if, in seasons of drought, it becomes inadequate for that purpose, he may detain the waters for such a reasonable time, as may be necessary to raise the requisite head to enable him to use it advantageously and profitably upon such machinery. He has no right to erect machinery, requiring for its propulsion more water than the stream furnishes at its ordinary stages, and operate such machinery by accumulating the water and discharging it upon those below in unusual quantities to their prejudice. Nor has he a right to create a reservoir, and detain and store the water therein for future use in a dry season.

Plaintiff erected a dam across a stream flowing through his land, and used it to detain the water in the pond during the autumn and spring, when his factory was adequately supplied with water from another source; when that failed the deficiency was made up from the reservoir thus created. Defendant, the owner of land upon the stream below, opened the gates and let off the accumulated waters, claiming the right so to do.

Held, that an injunction could not be sustained; that it was no argument therefor that the detention of the water was no injury to defendant, or that he insisted upon his legal rights to the water from bad motives, or purposes of annoyance.

While equity may not interfere to secure to a party a legal right of no value, it will not interpose to restrain him from enforcing such a right.

(Decided November 28, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the sixth judicial district, affirming a judgment in favor of plaintiff entered upon the decision of the court at General Term.

This action is brought to restrain defendant from opening the gate of plaintiff's dam, and letting off the accumulated waters.

Statement of case.

At the village of Laurens, the plaintiff has a cotton factory, propelled by water power derived by means of damming, at the factory, a stream which takes its rise in a lake at a point three and a half miles distant; and is also the owner of the land forming the boundaries of the lake and at its outlet.

The lake is formed by springs that empty their waters therein, and by surface water during the rainy seasons, and from the melting of snows.

The defendant is the owner of a large farm between said lake and said factory, lying upon both sides of said stream, upon which is a water power and saw-mill, situate about half a mile below said lake.

In 1848, the grantors of plaintiff lowered the outlet of said lake seven feet below its original and natural position, and built a dam across said outlet seven feet higher than the level of such original outlet, making such dam, from the bottom of such deeper outlet to its top, fourteen feet in height.

A trunk and gate were placed in the bottom of such deeper outlet, and the same was used to save a large supply of water for the dry season; and in 1855, the plaintiff's grantors raised said dam four feet higher for the same purposes.

The dam has been used to restrain and detain the waters in said lake as a reservoir, during such portions of the year as the factory was adequately supplied with water from said stream, below said dam, and from its tributaries. When these sources failed to supply the necessary quantity of water, the deficiency was supplied from said reservoir in a steady and constant manner through the gate in the trunk, which is about a foot square.

The waters in and from said dam have been restrained and used, with the sole view of economizing and utilizing the same to the greatest possible extent, and in no case has said dam been used or controlled by plaintiff or his grantors viciously or in bad faith, with intent to injure, or in any way wrong the defendant or his grantors.

As said reservoir or lake has been maintained and used, it

has been and is of great practical value and benefit to said defendant's power.

The defendant, in the fall of 1866, and in March, 1867, before the commencement of this action, went upon plaintiff's premises, without his permission, and raised the gate in said trunk of the dam, and let off and discharged from said lake a large quantity of water, which was wasted and lost to said plaintiff, because the same was not then needed for his said factory, whereby the plaintiff suffered damage in the sum of $100, and the defendant, at the same and at other times, threatened to open said gate and let off said waters whenever he pleased, and claimed the right to do so.

The court decided, as matter of law, that plaintiff was entitled to an injunction restraining defendant, his agents and servants, from interfering with the plaintiff's said dams and water power, as prayed for in the complaint; and under that order judgment was entered.

H. Sturges, for appellant. Every riparian proprietor has an equal right to the use of the water of a stream. (3 Kent, 439; *Webb* v. *P. Man. Co.*, 3 Summer's, 189.) He cannot detain or divert the water. (Angell on Watercourses, § 95; *Merritt* v. *Brinkerhoff*, 17 John., 306; *Van Hoesen* v. *Coventry*, 10 Barb., 518; *Pollett* v. *Long*, 38 Barb., 20.)

L. J. Burditt, for respondent. A person owning land through which a stream runs, has a right to dam it and detain the water, provided he does not do it unreasonably to the material injury of the owners below. (Washburne on Easements.) The injury must be more than a theoretical one. (*Thompson* v. *Crocker*, 9 Pick., 59; *Cooper* v. *Hall*, 5 Ohio, 320; *Thomas* v. *Brackenbury*, 17 Barb., 654; *Shove* v. *Voorhes*, 2 Green Ch., 25.) A mere inconvenience is not a material injury. (*Hartzell* v. *Sill*, 12 Penn. St., 248; *Palmer* v. *Mulligan*, 3 Caines, 307; *Hay* v. *Sterritt*, 2 Watts, 327; *Hetrick* v. *Deachler*, 6 Penn. St., 32; *Wheeler* v. *Ahl*, 29 Penn. St., 98; *Merritt* v. *Brinkerhoff*, 17 Johns., 306;

Pitts v. *Lancaster*, 13 Metc., 156.) The upper proprietor has a right to detain the water so far as reasonable and necessary for mill purposes. (*Gould* v. *Boston Duck Co.*, 13 Gray, 442, 453; *Cary* v. *Daniels*, 8 Metc., 348; *Hetrick* v. *Deachler*, 6 Penn. St., 32; Angell on Watercourses, § 119; *Bardwell* v. *Pickering*, 22 Pick., 333; Washburn on Easements, 270; *Barrett* v. *Parsons*, 10 Cush., 367, 371; *Thurber* v. *Martin*, 2d Gray, 394.) The true tests of the use is, whether it is to the injury of the other proprietors or not. (Also see Angell on Watercourses, §§ 117, 118; *Merritt* v. *Brinkerhoff*, 17 John., 306; *Palmer* v. *Mulligan*, 3 Caines, 307.) The owner may change or deepen the channel on his own land, provided he returns the water at its accustomed point below. (*McLamont* v. *Whitaker*, 3 Rawl., 84; *Gould* v. *B. D. Co.*, 12 Gray, 442; *Norton* v. *Valentine*, 14 Vt., 239; *Ford* v. *Whitbeck*, 27 Vt., 265.) Defendant's grantor having consented to and assisted in building dam, he is estopped. (Angell on Watercourses, § 328; *Brown* v. *Bowen*, 30 N. Y., 519; *Manf'rs' and Traders' Bank* v. *Hazard*, 30 N. Y., 226; *Corning* v. *Troy Iron & Nail Factory*, 29 Barb., 311; Washburne on Easements, 287; *Ford* v. *Whitbeck*, 27 Vt., 265; *Devonshire* v. *Elgin*, 7 Eng. L. & Eq., 39; *Wetmore* v. *White*, 2 Caine's Cas., 86.) This is a case where perpetual injunction should be granted. (Angell on Watercourses, §§ 449, 450; Story's Equity Jurisprudence, § 901; *Corning* v. *Troy Iron and Nail Factory*, 39 Barb., 311.)

GROVER, J. The judgment restraining the defendant, from interfering with the gate and other structures of the plaintiff at the outlet of the pond, can be sustained only in case the plaintiff has the right to maintain the dam and other structures, and thereby control the flow of the water in the manner and for the purposes found by the Special Term. It was controlled by him; and for affecting which, the structures were erected. From these facts it appears, that the dam and structures were erected at the outlet of a natural pond of about forty acres, into which one or more small streams run, having

but a small quantity of water in a dry time flowing therein. But in the wet seasons, spring and fall, a much larger quantity flowed into and out of the pond. That the dam was constructed about ten feet above the natural outlet of the pond, and used to detain the water in the pond during such portions of the year as the plaintiff's factory was adequately supplied with water from a stream below the dam. (The latter a stream originating from another source.) And when this failed to furnish an adequate supply, the deficiency was supplied from the reservoir, in a steady and constant manner through a gate in a trunk of about a foot square. That the waters have been retained and used by the plaintiff with the sole view of economizing and utilizing the same, to the greatest possible extent, not viciously or with any intent to injure, or in any way wrong the defendant. It further appears from such finding, that the water was so detained by the plaintiff during the wet seasons in the spring and fall, until wanted for use by the plaintiff in the dry seasons of winter and summer. The judgment, in effect, determines, that the plaintiff has a right so to detain and use the water, it being necessary so to do, to give an adequate and profitable power to propel the machinery of a factory owned by him, situate about three miles below the outlet as against the defendant. The defendant is the owner of a parcel of land, situated upon both sides of the stream between the outlet and the plaintiff's factory, upon which there is a saw-mill operated by the defendant during portions of the year. The question to be determined is of great importance to the plaintiff, the case showing that his factory is of great value, which will be much impaired, if not wholly destroyed, by not enjoying the right to control and use the water in the manner claimed by him in this action. While this consideration should induce care in the examination of the case, it can have no weight in the determination of the legal rights of the parties. It is the duty of the court to apply the law as it is to the facts of every case, and give to every party his legal rights, irrespective of any hardship that may be thereby caused in any special case. It

is necessary to examine the question as to the rights of riparian owners, as the judgment for the plaintiff, to its full extent, depends wholly upon those rights. Kent (3 Com., 439) says, that every proprietor of lands on the banks of a river, has naturally an equal right to the use of water which flows in the stream adjacent to his lands, as it was wont to run (*currere solebat*), without diminution or alteration: No proprietor has a right to use the water, to the prejudice of other proprietors, above or below him, unless he has a prior right to divert it, or a title to some exclusive enjoyment. He has no property in the water itself, but a simple usufruct while it passes along. "*Aqua currit et debet currere ut currere solebat,*" is the language of the law. Though he may use the water while it runs over his land as an incident to the land, he cannot unreasonably detain it or give it another direction, and he must return it to its ordinary channel when it leaves his estate. In *Tyler* v. *Wilkinson* (4 Mason, 397), Judge STORY, after a thorough examination of the authorities, says, that every proprietor upon each bank of a river, is entitled to the land covered with water in front of his bank to the middle thread of the stream, etc. In virtue of this ownership, he has a right to the use of the water flowing over it in its natural current, without diminution or obstruction. But, strictly speaking, he has no property in the water itself, but a simple use of it while it passes along. The consequence of this principle is, that no proprietor has a right to use the water to the prejudice of another. It is wholly immaterial whether the party be a proprietor above or below in the course of a river; the right being common to all the proprietors on the river, no one has a right to diminish the quantity which will, according to the natural current, flow to a proprietor below, or to throw it back upon a proprietor above. This is the necessary result of the perfect equality of right among all the proprietors, of that which is common to all. The natural stream existing by the bounty of Providence for the benefit of the land through which it flows, is an incident annexed by operation of law to the land itself. When

I speak of this common right, I do not mean to be understood as holding the doctrine that there can be no diminution whatsoever, and no obstruction or impediment whatsoever, by a riparian proprietor in the use of the water as it flows, for that would be to deny any valuable use of it. There may be and there must be allowed, of that which is common to all, a reasonable use. The true test of the principle and extent of the use, is whether it is to the injury of the other proprietors or not. There may be a diminution in quantity, or retardation or acceleration of the natural current, indispensable for the general and valuable use of the water, properly consistent with the existence of the common right. The diminution, retardation or acceleration not positively or sensibly injurious, by diminishing the value of the common right, is an implied element in the right of using the stream at all. The law here, as in many other cases, acts with a reasonable reference to public convenience and general good, and is not betrayed into a narrow strictness, subversive of common sense nor into extravagant looseness, which would destroy private rights. A water-course begins *ex jure naturae*, and having, taken a certain course naturally, cannot be diverted. "*Aqua currit et debet currere ut currere solebat*" is also the language of the ancient common-law. That is, the water runs naturally and should be permitted thus to run, so that all, through whose lands it runs may enjoy the privilege of using it. (Angell on Water-courses, section 93.) This is sustained by numerous judicial decisions and all elementary writers upon the subject. How far the natural flow of the stream may be interfered with by a riparian owner, to enable such owner to utilize the stream for the purpose of propelling machinery, has frequently been the subject of judicial examination. *Gould* v. *The Boston Duck Co.* (13 Gray, 443) may be regarded as a leading case upon this point. In this case the defendant had built a substantial dam upon the stream, and drew the water to its factory by means of a canal, and after using the same, returned it to its natural channel before it reached the plaintiff's land. The stream, at ordinary stages

of water, afforded an ample supply for the defendants' factory; but in seasons of great drought the defendants were unable to operate their factory, during all the usual working hours of each day, but were obliged, in order to create the requisite head and supply of water, to shut their gates earlier than usual on some days, and sometimes for an entire day, and thus arrest the usual flow of the water. This was the injury complained of by the plaintiff, who was the owner of a mill upon the stream directly below the dam, and who was injured, to some extent by being deprived of the use of the water, while the natural flow was thus arrested. The court held that this use of the water by the defendant was not unreasonable, and that if such use did at times interfere with the use which the plaintiff might have made of the water it was "*damnum absque injuria.*" The doctrine of this case simply is, that a party has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and if the stream in seasons of drought becomes inadequate for that purpose, he has a right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery. I think this is the correct legal rule by which to determine the rights of riparian owners. This will enable each owner to make an advantageous use of the water. The machinery must be such as the power of the stream, in its ordinary stages, is adequate to propel. The water in times of drought, may be detained for such a length of time only, as is necessary to enable it to be advantageously and profitably used upon such machinery. If so used the accumulation will be discharged in quantities not beyond the usual flow of the stream. This will enable every owner in seasons of drought, when unable to use the water at all as then naturally flowing, to operate his machinery to some extent by obtaining the water so as to raise a proper head, and such quantity as to enable him to use the same. By so doing he is not liable to an action by an owner below, whose machinery does not require for its

operation all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent injured by being deprived of the natural flow. But the machinery must be adapted to the power of the stream at its usual stage. An owner has no right to erect machinery, requiring for its operation more water than the stream furnishes at an ordinary stage, and operate such machinery by ponds full, discharging upon those below in unusual quantities, by means of which the latter are unable to use it. (*Merritt* v. *Brinkerhoff*, 17 Johns., 306.) In *Pitts* v. *The Lancaster Mills* (13 Metcalf, 156), it was held, that an owner had a right to construct a dam and detain the water long enough to raise a head by filling it, permitting it then to resume its natural flow. In *Brace* v. *Yale* (10 Allen, 441), it was held, that the erection of a reservoir dam upon a small stream and thereby detaining and storing up the water until the owner of the dam desired to use it, and drawing from the pond and using it when he had occasion, was a user of the stream adverse to the rights of the owners below; and if continued for a sufficient length of time refined into a right. This, in effect, is an adjudication that an owner has not a right to create a reservoir and store the water therein for future use; and that by so doing he violates the rights of the owners below, for the preservation of which the law will afford a remedy. The plaintiff cites *Hoy* v. *Sterrett* (2 Watts, 327); *Hetrich* v. *Deachler* (6 Penn., 32); and *Hartzell* v. *Sill* (12 Penn., 248), as sustaining the right to store the water for future use claimed by the plaintiff. *Hetrich* v. *Deachler* simply holds, that the reasonableness of the detention of water by the owner above to the injury of the owner below, depending as it must on the nature and size of the stream as well as the business to which it was subservient, was a question of fact for the jury, it being impossible to make any general rule. *Hoy* v. *Sterrett*, so far as the questions involved have any bearing upon the present case, is the same as *Hetrich* v. *Deachler*. In *Hartzell* v. *Sill* (12 Penn., 248), it was held, that the proprietor of a mill above had the right to detain

the water long enough for the proper use of his mill; and if by so doing the owner below was injured, it was "*damnum absque injuria*;" and whether longer detained than necessary, was a question of fact for the jury. This is an entirely different question from that involved in the present case; that is, whether when the stream furnishes more water than is necessary to run a mill, the owner has a right, by means of a reservoir dam, to store up such surplus water and detain it until he shall want it for use in a dry season. *Wheeler* v. *Ahl* is in conflict with the law of this State. In this case the defendant had erected machinery, that the usual quantity of water in the stream was inadequate to propel. It was held that he might erect a dam, accumulate the water, and with such accumulation, run his machinery, discharging the water in unusual quantities upon the owner below. This is in direct conflict with *Merritt* v. *Brinkerhoof* (17 Johns., 320). This right, claimed by the plaintiff, to detain such surplus water of the stream as he may not require for present use until wanted in a dry season, has no foundation in the law, and is in direct conflict with the maxim, *aqua currit*, etc. (*supra*). But it is insisted that this detention does no material injury to the defendant, but that, on the contrary, his power is made more valuable by this use of the water. The answer to this is, that he must be the judge whether he will accept of any such benefit. He is entitled to the water and to its use for sawing in the spring, according to the natural flow, and is not obliged to accept and use it for that or any other purpose during the drought of summer. Again, it is said, and the fact is so found by the Special Term, that the defendant insists upon his right to the natural flow of the water in the stream from a bad motive, and for the purpose of annoying the plaintiff. This is immaterial. Courts have no power to deny to a party his legal right, because it disapproves his motives for insisting upon it. The use of the water by the plaintiff, to the extent awarded by the judgment, and protected by the injunction, has not continued twenty years. The plaintiff has acquired no right by prescription. Whether he has any such a right

to detain the water by a five feet dam, as held by the court below, is a grave question upon the evidence; but, as its determination is not necessary, and as the evidence may be different upon another trial, I shall not examine or pass upon it. The counsel for the plaintiff cites from the opinion of WOODRUFF, J., in *Corning* v. *The Troy Nail Factory* (40 N. Y., 220), the proposition that, if it was clear that the restoration of the water was of no value to the plaintiff, the case would not call for equitable interference. Assuming this to be correct, it has no application to the present case. It may be true, that equity will not interfere to secure to a party a legal right of no value to him, but leave him to his remedy at law. But, interfering to restrain him from enforcing such a right, on the ground that it is of no value, is quite another affair. That is the present case. That equity will not restrain a party from enforcing his legal right, upon any such ground, is too clear for discussion. There was nothing in the evidence or findings, showing that the defendant was estopped from asserting his right to the natural flow of the water. The judgment appealed from must be reversed, and a new trial ordered; costs to be determined by the court in the decision of the case.

All concur, except PECKHAM, J., not voting.

Judgment reversed.

JOSEPH BALCH, Appellant, *v.* THE NEW YORK AND OSWEGO MIDLAND RAILROAD Co., Respondent.

The words "laborer" and "labor," as used in the general railroad act of 1850 (section 12, chapter 140, Laws of 1850), which gives a laborer a claim against the company for the indebtedness of a contractor in certain cases, and to a limited amount, are used in their ordinary and usual sense, and imply the personal service and work of the individual designed to be protected. The former does not include one who contracts for and furnishes the labor and services of others, or who contracts for and fur-

Statement of case.

nishes a team or teams for work, whether with or without his own services. (PECKHAM and GROVER, JJ., dissenting.)

(Argued November 11th, 1871; decided November 28th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the fifth district, affirming a judgment entered upon the report of a referee against the plaintiff.

The action was brought to recover for work done by the plaintiff with his team, in constructing the defendant's road, under and by virtue of section 12 of the general railroad act. Also for work done by one Annin, with his team, and by one Eddy, with his team, in constructing the same road. The persons last named assigned their several demands to the plaintiff.

The firm of McNary, Claflin & Co. were contractors with the defendant for the construction of a portion of its road; and Stedman, Brown & Co. were contractors with McNary, Claflin & Co. for constructing a part of their job. Stedman, Brown & Co. employed the plaintiff and his assignors. They were not paid for their work, and severally notified the defendant as required by the statute.

The plaintiff and his assignors severally worked with his team for the contractor at three dollars and fifty cents per day.

The referee held, as matter of law, that a party, who, with his team performed labor at an agreed price for himself and team, could not recover. The plaintiff duly excepted.

Section 12 of chapter 140, Laws of 1850, under which this action is brought, reads as follows: "As often as *any contractor* for the construction of any part of a railroad which is in progress of construction, shall be indebted to *any laborer* for thirty or any less number of days labor performed in constructing said road, *such laborer* may give notice of such indebtedness to said company in the manner herein provided. And said company shall thereupon become liable to pay such laborer the amount so due him for such labor; and an action may be maintained against said company therefor. Such

notice shall be given by said laborer to said company, within twenty days after the performance of the number of day's labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of day's labor, and the time when the same was performed, for which the claim is made, and the *name of the contractor from whom due*; and shall be signed by such laborer or his attorney; and shall be served on an engineer, agent or superintendent employed by said company, having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided."

F. Kernan, for appellant. The provision extends to laborers employed by a sub-contractor. (*Kent* v. *N. Y. C. R. R.*, 12 N. Y., 628.) The provision is remedial and should have a reasonable construction to effect the end in view. (Kent's Com., p. 469; Dwarris on Stat., 615; *Warner* v. *H. R. R. Co.*, 5 How., 454.) The statute protects the man, who, with his tools or team performs labor. (*Warner* v. *H. R. R. Co.*, 5 How., 452; *Swift* v. *Kingsley*, 24 Barb., 541, 546; *Atcherson* v. *Troy*, 6 Abb., N. S., 331, 333.)

J. C. Kennedy, for respondent. The statute only protects actual laborers. (*Swift* v. *Kingsley*, 24 Barb., 541, 545; *Coffin* v. *Reynolds*, 37 N. Y., 640, 646; 24 Barb., 87; 38 Bar., 390; 24 N. Y., 643.)

ALLEN, J. By the general railroad act of 1850 (Laws of 1850, chap. 140, § 12), a claim is given against a railroad corporation, for the indebtedness of a contractor to any laborer, for thirty or any less number of days' labor, performed in constructing the road of such corporation. The act requires the laborer to give notice, within a limited time, of the num-

ber of days' labor for which the claim is made. The notice must state, among other things, the amount and number of days' labor, and the time when the same was performed.

The terms "laborer" and "labor" were used in their ordinary and usual sense; and the provision was intended to secure the common laborer, one who earned his daily bread by his toil, a compensation for his own work. The terms necessarily imply the personal service and work of the individual designed to be protected. The term "laborer" cannot be construed as designating one who contracts for and furnishes the labor and service of others, or one who contracts for and furnishes one or more teams for work, whether with or without his own services or the services of others to take charge of the teams while engaged in the service. When once an enlarged meaning is given to the words "laborer" and "labor," as used in the statute, one more extensive than that given by lexicographers, or than is popularly given to them, and so as to include those who perform work by themselves as well as by agents and servants, or themselves with a team, or with mechanical appliances, there will be little difficulty in the effort to give a liberal effect to the statute to bring within its terms all who, in any way, contribute to the construction of the road by furnishing labor of others, or in any form and by any means, and without limit as to the amount or character of the labor, subject only to the limitation of thirty days for its performance. If a man is entitled to the benefit of the statute who furnishes one team, the man who furnishes fifty is within the same rule; and the fact that the man labors with, or drives his team, or by himself and his servants drive all his teams, cannot affect the principle.

In neither case is the labor performed by the team that of a laborer. (*Conant* v. *Van Schaick*, 24 Barb., 87; *Ericsson* v. *Brown*, 38 id., 390; both approved in *Coffin* v. *Reynolds*, 37 N. Y., 640.) In the latter case the meaning of the same terms used in an analogous statute was restricted, and held not to include skilled artificers or those rendering service requiring skill, or such as are not regarded as common, ordi-

nary labor, and the act was confined in its operation and effect to manual labor not requiring skill.

The principle of these cases should be decisive of this. The court, in *Aiken* v. *Wasson* (24 N. Y., 482), says: "It is obvious, from the nature and terms of this and other provisions of the act, as from a general policy indicated by analogous statutes, that the legislature intended to throw a special protection around that class of persons who should actually perform the *manual* labor of the company." They say, further, that it would not harmonize with the general scope and object of the act to give the words their broadest interpretation. In the two opinions delivered in this court in *Atcherson* v. *Troy and Boston R. R. Co.* (6 Abb. Pr. R., N. S., 329), the very point involved here was affirmed in accordance with the judgment of the Supreme Court in this case, and the judgment of the court was in accordance with the result of these opinions. The learned reporter of the court at that time, speaking from his notes, says that the precise point was not decided by the concurring opinion of five judges. But the statement of the judges, as well as their argument, is high evidence of the law, and their opinions are entitled to great respect, even if they were not adopted by a sufficient number of judges to give them authority as the judgment of the court, there being in the case other grounds for the decision actually given. It does appear that the judgment was so modified as to give the plaintiff a judgment for his own labor only, on the ground that no objection was made to that in the court below.

It is not allowable, and would lead to mischief, in the interpretation and application of statutes, to give this statute a latitudinarian construction, which would include within it the claim of the plaintiff. It is not warranted by principle, and the authorities are opposed to it.

I am for an affirmance of the judgment.

Ch. J., ALLEN, FOLGER, and RAPALLO, JJ., concur; GROVER and PECKHAM, JJ., dissent.

Judgment affirmed.

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WILLIAM H. SHEARMAN, Respondent, v. THE NIAGARA FIRE INSURANCE COMPANY, Appellant.

A contract valid in its inception, becoming void by virtue of its provisions, may be revived by the act of the parties thereto. A condition of forfeiture in a policy of insurance may be waived, and the policy revived after the happening of the event, which works the forfeiture, by any act from which the consent of the underwriters may be inferred.

Defendant issued a policy of insurance to L. J. S. upon his dwelling-house. The policy contained a clause, that if the property was sold or transferred, or any change took place in title or possession, without the consent of the company, it would be void. The property was transferred to plaintiff March 4th. The policy was renewed March 21st, and was transferred to plaintiff April 15th, on the same day defendant's agent consented to the transfer of the policy. L. J. S. remained in possession. During a temporary absence he left the house in charge of B, and it was destroyed by fire.

Held, that the renewal revived the original policy, and continued it with all the virtue which it it would have had for any purpose, if it had not expired. That the consent to the assignment was equivalent to an agreement, to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on the renewal was a good consideration. That there was no change of possession within the meaning of the contract.

(Argued November 17th, 1871; decided November 28th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the first judicial district, affirming a judgment entered upon a verdict in favor of plaintiff.

The action is brought to recover upon a policy of insurance issued by defendant.

The defendant, with three other companies, issued a policy insuring Lewis J. Shearman for one year from March 21st, 1866, for $2,800 on his dwelling, and $200 on shrubbery and fencing, situate on Castle street, Wilmington, N. C., each company to be severally liable for one-quarter. On November 22, 1866, the insurance was increased to $3,500.

On March 21, 1867, the policy was renewed for one year.

On March 4th, 1867, Lewis J. Shearman conveyed the pro-

perty to the plaintiff; and on April 15th, 1867, he delivered to the plaintiff the policy with the following assignment indorsed thereon:

"For value received I hereby assign, transfer, and set over to William H. Shearman all the right, title, and interest in and to the within policy, and all benefit and advantage to be derived therefrom.

"Dated at Wilmington, N. C., the 15th day of April, 1867.

"LEWIS J. SHEARMAN."

The companies simultaneously consented as follows:

"The insurance companies, within named, hereby consent that the interest of L. J. Shearman, in the within policy, be assigned to William H. Shearman, subject to all the terms and conditions therein mentioned and set forth.

"Dated at Wilmington, N. C., the 15th day of April, 1867.

"DE ROSSETT & Co., Agents."

The property was totally destroyed by fire in the night of June 4th, 1867. Lewis J. Shearman, the original assured, remained the occupant, a Mr. McGreal living with him. At the time of the fire Lewis J. Shearman was on his way back to Wilmington from taking his family to Brattleboro. Mr. McGreal was living in the house; and during Mr. Shearman's absence a Mr. Brown was taking care of the house for him. Of this the companys' agents were notified. Defendant moved for a nonsuit upon the grounds among others:

1. That the policy was a wager policy, having been renewed on March 21st, 1867, to Lewis J. Shearman, who had previously, on March, 4th, 1867, conveyed to the plaintiff, and had no insurable interest in the property.

2. That the conveyance to the plaintiff having been *prior* to the consent of the companys', the policy became void, and was not revived by the companys' subsequent consent.

3. That there was a change of possession.

The jury gave a verdict for the amount of the policy.

S. Hand, for appellant. L. J. Shearman's insurable interest ceased on assignment of property, and the renewal was a wager policy. (1 Parsons on Marine Ins., 56; *Fowler* v. *N. Y. Ind. Ins. Co.*, 26 N. Y., 422; Parsons on Marine Ins., vol. 1, p. 156; *Ruse* v. *Mut. Ins. Co.*, 23 N. Y., 516; *Peabody* v. *Washington Co. Ins. Co.*, 20 Barb., 340; *Gray* v. *Hook*, 4 N. Y., 449; *Bell* v. *Leggett*, 7 id., 176; *Springfield Ins. Co.* v. *Allen*, 43 id., 389.) If he had any insurable interest, it was so disproportioned to amount of insurance as to make policy void. (1 Parsons on Ins., 155; *Heath* v. *N. Y. Mut. Ins. Co.*, 8 Bosw., 557.) No assent to the transfer of the property was shown. This rendered policy void. (*Smith* v. *Sar. Mut. F. Ins. Co.*, 3 Hill, 518.) The policy having become void, nothing but an express contract could revive it. (*Baker* v. *Un. L. Ins. Co.*, 44 N. Y., 283; *Smith* v. *The Sar. Co. Mut. F. Ins. Co.*, 3 Hill, 508; *Neely* v. *The On. Ins. Co.*, 7 id., 49.) The agent had no power to to waive forfeiture. (*Wall* v. *Home Insurance Co.*, 8 Bosw., 597.)

J. E. Parsons, for respondent. Shearman's absence did not constitute change of possession. (*Jolly* v. *Balt. Eq. Soc.*, 1 Harr. & Gill, 295; *Rafferty* v. *N. B. Fire Ins. Co.*, 3 Harrison, 488; *Lyon* v. *Com. Ins. Co.*, 2 Rob. La., 266.) The consent to the assignment of the policy revived it. (*Solms* v. *Rutgers F. Ins. Co.*, 5 Abb., N. S., 201, 211; *Hooper* v. *H. R. F. Ins. Co.*, 17 N. Y., 424; *Wolf* v. *The S. F. Ins. Co.*, 39 id., 57; *Keeler* v. *U. S. Ins. Co.*, 16 Wis., 520; *Carroll* v. *Charter Oak Ins. Co.*, 38 Barb., 402; *Howard* v. *Alb. Ins. Co.*, 3 Denio, 303.) Shearman had an insurable interest. (*Stetson* v. *Mass. Ins. Co.*, 4 Mass., 330; *Ætna Ins. Co.* v. *Tyler*, 16 Wend., 385.)

CHURCH, Ch. J. The points relied upon by the appellants in this court, are the same presented upon a motion for a nonsuit, when the plaintiff rested, and again at the close of the evidence. They are, substantially: 1. That the property,

having been transferred without the consent of the company, the renewal of the policy afterward without such consent was void, and rendered the policy a wager policy, void both by statute and common-law. 2. That there was no evidence of a consent on the part of the company, to a transfer of the property to the plaintiff; and 3. That there was such a change of possession of the property as to render the policy void.

The property was transferred to the plaintiff on the 4th of March, 1867, the renewal was made the 21st of March, and on the 15th of April of the same year the policy was transferred to the plaintiff. On the same day the defendant, by its agent, by an indorsement on the back, consented to such transfer of the policy.

It is well settled that the person insured must have an insurable interest in the property (26 N. Y., 422; 23 N. Y., 516); and one of the conditions of the policy is, that if any transfer of the title or possession of the property is made, without the consent of the company, the policy shall be void.

Assuming that when Lewis I. Shearman transferred the property he retained no insurable interest, I cannot assent to the position, that the policy thereby became a wager policy, and void in the sense that it was an illegal contract, and that it could not be revived and restored to life by the act of the defendant. It was void, not for any vice or illegality in the contract itself, but for the reason that there was nothing upon which it could operate. (*Howard* v. *Albany Ins. Co.*, 3 Denio, 301.) The parties, it is true, agreed that in a certain contingency it should be void; and if a loss had occurred during that period, no action could have been maintained upon the policy, but the happening of the contingency did not impress upon the contract the character of illegality, so that no subsequent agreement could restore it. The case of *Gray* v. *Hook* (4 Comst., 449), cited by the learned counsel for the appellant, will serve to illustrate the distinction between a contract valid in its creation, which has become void by an act of the party so that it cannot be enforced, and

one that is illegal and contrary to public policy. In that case the cause of action grew out of an agreement between the plaintiff and defendant, by which one of them was to withdraw his application for appointment to an office by the governor in favor of the other, upon an agreement to divide the fees. The court very properly held that this agreement was contrary to public policy, and void at common-law, and being thus tainted, no new agreement entered into to carry into effect any of its provisions was valid. The same principle was decided by this court in *Woodworth* v. *Bennett* (43 N. Y., 273). But this principle is not applicable to the present case. Here the original contract was lawful and valid; it was not tainted with the vice of corruption or other illegality. It had become void according to its terms, and in that condition it could not be enforced; but it was not beyond resurrection by the act of the parties themselves.

I am aware that there is an intimation, by BRONSON, J., in *Smith* v. *Saratoga County Mutual Fire Insurance Company* (3 Hill, 508), that a mere waiver would not revive such a policy. He says: "It is difficult to see how anything short of a new creation could impart vitality to this dead body." He did not, however, intend to decide the question of waiver, and added: "But it is unnecessary to put this case upon the ground that the forfeiture could not be waived;" and then proceeds to show that there had been no waiver.

In 7 Hill, 49, in a similar case, BEARDSLEY, J., said: "Whether a policy, after having become void by the alienation of the property insured, can be restored to vitality by a mere act of waiver on the part of the underwriters, need not now be decided." Precisely what is intended as a "mere act of waiver" is not very clear; but it is probable that both of the learned judges intended to make a distinction, between such an act and an act which would amount to an agreement to revive and continue the contract.

I have been unable to find any adjudged case holding that such forfeiture may not be waived, and such policy revived, by an act from which the consent of the underwriters may

fairly be inferred. The authorities in this State and elsewhere are quite decisive that it may be done. (*Solms* v. *Rutgers Fire Ins. Co.*, 5 Abb., N. S., 201; *Howell* v. *Knickerbocker Fire Ins. Co.*, 44 N. Y., 276; *Wolfe* v. *Security Fire Ins. Co.*, 39 id., 51; *Hooper* v. *Hudson River Fire Ins. Co.*, 17 id., 424; *Carroll* v. *Charter Oak Fire Ins. Co.*, 38 Barb., 402; *Keeler* v. *Niagara Fire Ins. Co.*, 16 Wis., 523.)

It is claimed, however, by the counsel for the appellant, that, when the renewal was obtained, the transfer had been made, and that this renewal constituted a new policy, which was void and illegal within the principles before stated. I do not think so. The renewal simply revived the original policy, and continued it with all the virtue which it would have had, for any purpose, if it had not expired. Besides, Lewis J. Shearman had an insurable interest remaining, as lessee and owner of the equity of redemption, which may be deemed sufficient to obviate this objection.

The important question is, whether the forfeiture was waived and the policy revived by the consent of the defendant to the transfer of it to the plaintiff. In the case of an insurance upon goods, it has been held by this court, that a request that the company would consent to an assignment of the policy, was a sufficient notice to them that the party making it had acquired, or was about to acquire, some interest in the goods insured, and was a compliance with the condition of the policy on that subject. (*Hooper* v. *Hudson River Fire Ins. Co.*, 17 N. Y., 424; *Wolfe* v. *The Security Fire Ins. Co.*, 39 id., 49.) An assignment of the policy would be useless, for any purpose, unless the assignee had some interest in the subject insured. This interest may be as owner or encumbrancer, but whatever it is, the underwriters by consenting to the assignment, agree to become answerable to the assignee, to the extent of whatever interest he has, and if the whole interest is transferred, the consent is equivalent to an agreement to be liable to the assignee upon the policy as a subsisting operative contract. I see no reason why the same rule should not apply to a policy upon real, as well as

personal property, but it is unnecessary in this case to determine that the request to assign was a sufficient notice of the transfer of the property, because it expressly appears that the agent was informed of the fact at the time the request was made. It is objected that the agent was not informed of the time of the transfer, nor that the renewal was subsequent to the transfer, but this is not material. It is enough that the plaintiff requested that he should be substituted as the insured, on the ground that the property had been transferred to him, and the company consented to it. It is of no importance whether his conveyance was recent or remote, nor whether they knew that the policy was void at the time of the renewal by reason of the transfer before that time. They might have insisted upon the forfeiture if they so elected, at whatever time it was made. They knew that the policy was void when the request was made, and they chose to revive it, and thereby consented to insure the property in the hands of the plaintiff as effectually as if they had given a new policy to him. The retention of the premium received on the renewal, was a good consideration for this agreement. No other construction can be given to the transaction. The condition requiring consent is important to underwriters, to enable them to determine the character and standing of the insured; and when they agree to a transfer of a policy to a particular person, knowing that he owns the subject insured, the whole purpose of the provision is complied with, and they have no interest to know how or why he acquired it.

The only remaining point made is, that possession of the premises was changed, which rendered the policy void. Lewis J. Shearman remained the occupant of the premises, and was temporarily absent with his family at the time of the fire. The house was in charge of one Brown for him. This is not such a change of possession as will avoid the policy. Brown's possession was in fact and in law Shearman's possession. He was nothing more than the servant of Shearman, to take care of the house during the temporary absence of the latter with

his family. The construction claimed for this provision is altogether too strict and technical. It is never contemplated that the insured shall constantly remain on the premises.

For aught that appears, the person left in charge was a proper and competent agent or servant for that purpose, and there is no claim that the fire occurred through his negligence or fault. The judgment must be affirmed.

All concur.

Judgment affirmed.

EBENEZER B. COBB, Appellant, *v.* SAMUEL A. HATFIELD and ELIJAH P. FENTON, Respondents.

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In order to rescind a contract, on the ground of fraud, there must not only be a disaffirmance of it at the earliest practicable moment after the discovery, but a return of all that has been received under it, and a restoration of the other party, to the condition in which he stood, before the contract was made.

The taking of any benefit under the contract after knowledge of the fraud, or changing the condition of the property, the subject-matter of the contract, is a ratification of it.

Plaintiff sought to recover as upon the rescission of a contract, for the purchase of an undivided share or interest in certain oil property in Pennsylvania. The assignment entitled plaintiff, to receive a proportionate number of shares of the stock of an incorporated association, when it was fully organized. Defendant offered to show that plaintiff received the stock in accordance with the contract, and had never returned it, or canceled it, or offered so to do. This evidence was excluded.

Held, Error. That if the certificate of stock was received after knowledge of fraud, it was an election to abide by the contract, if before, plaintiff upon a rescission was bound to transfer or tender it to defendants.

An appeal from an order granting a new trial, with the stipulation required, of judgment absolute in case the order is sustained, is only proper and admissible, when the *sole* question that can be presented upon the record, relates to and will determine the merits of the controversy, and cannot be obviated upon a second trial. Where there are exceptions which, if sustained, will entitle the successful party to a new trial, but the decision of which will not necessarily determine the merits, the exceptions must be clearly frivolous to justify the hazard of such an appeal.

(Argued November 17, 1871; decided November 28, 1871.)

Statement of case.

APPEAL from an order of the General Term of the Supreme Court, in the seventh judicial district, reversing a judgment in favor of plaintiff, entered on verdict of a jury, and ordering a new trial.

This action was for the recovery of $1,000 and interest paid by the plaintiff to the defendants, upon the purchase of an interest in an oil property in Pennsylvania, upon the ground that the purchase had been induced by the false and fraudulent representations of the defendants as to the character, yield, and value of the property.

The plaintiff claimed to recover as upon a rescission of the contract and sale. Upon the trial the question of fraud was submitted to the jury, the court ruling and deciding, that the plaintiff had done sufficient to rescind the contract, and that if the fraud had been proved and the purchase had been made of, and payment made to the defendants, the plaintiff was entitled to recover. The facts material to the question disposed of, appear in the opinion. The jury found for the plaintiff upon the controverted questions of fact, and rendered a verdict for the amount claimed. Upon an appeal to the General Term of the Supreme Court from the judgment upon the verdict, the judgment was reversed for error in law and a new trial granted.

J. H. Reynolds, for appellant. Where plaintiff is only in possession of written promise of defendant, a tender and cancellation at trial is sufficient. (*Nichols* v. *Michael*, 23 N. Y., 264; *Ladd* v. *Moore*, 3 Sand. S. C. R., 589; *White* v. *Dodd*, 42 Barb., 555; *Fraschieris* v. *Henriques*, 36 Barb., 276; *Nichols* v. *Pinner*, 18 New York, 312.) Plaintiff can maintain separate action for his undivided injury. (*Doremus* v. *Selden*, 19 J. R., 213; *Ruckman* v. *Pitcher*, 1 N. Y., 392; *Ruckman* v. *Pitcher*, S. C., 20 N. Y., 9; *Ruckman* v. *Pitcher*, S. C., 13 Barb., 556.)

W. C. Ruger, for respondents. It was incumbent upon plaintiff to show, that he had restored to defendants all rights

or property received under the contract. (1 Den., 69; 2 Den., 136; 23 N. Y., 264; 14 Barb., 594; 2 Hill, 288; 5 Bar., 319; 5 Hill, 389; 35 Barb., 76; 32 Barb., 171.)

ALLEN, J. Under the complaint the plaintiff might have treated the action as in case for the recovery of damages for the alleged fraud; and in such action no return of property received from the defendants, or other act restoring the defendants to the condition they occupied before making the contract, would have been necessary as a condition precedent to maintaining the action. But upon the trial the plaintiff expressly repudiated the contract, and claimed to recover the money advanced, and paid, as upon a rescission of the contract, and at the close of the evidence on his part, tendered to the defendants, and offered to cancel the assignment and transfer, and claimed to recover in the action the consideration paid and interest, "solely upon the ground of a rescission of the contract" for the alleged fraudulent representations of the defendants. The recovery was had for the money paid and interest thereon. The judge charged the jury, that what had been done was sufficient to entitle the plaintiff to maintain the action, that it was a sufficient rescission of the contract. It is somewhat questionable whether the point upon which the Supreme Court reversed the judgment and granted a new trial, was properly taken. No question was made at the trial, as to the necessity of an immediate rescission of the contract upon a discovery of the fraud; and the judge at circuit did not rule, and was not called upon to rule in respect to the time at which the plaintiff should have rescinded the contract, and restored or tendered to the defendants what he had received. His attention was not called to that question, and *non constat*, that had the question been directly raised, the plaintiff might not have shown an earlier revocation than was shown at the trial. The judge only passed upon the character and quality of the acts relied upon as a rescission, and not as to their timely and seasonable performance.

But, passing this, a fatal error was committed, on the trial, in the exclusion of evidence offered by the defendants. The assignment and transfer to the plaintiff was of an undivided share or interest in certain property, and entitled him to a proportionate number of shares of the capital stock in the "Collins Oil Company," an incorporated association, when the corporation should be fully organized and prepared to issue stock certificates.

The capital stock of the corporation represented the interests of the proprietors of the property, of whom the plaintiff became one by his purchase of the defendants; and when he should receive his stock certificate, that, rather than the assignment and transfer from the defendants, would represent and evidence his ownership of the property and interests purchased. The corporation was organized, and stock certificates were issued to the owners, in October, 1865. The defendants offered to show, that the plaintiff applied at the office of the company for his stock, and that it was delivered to him in fulfillment of the contract of purchase from the defendants, and that he had accepted it and kept it, and had never returned it or canceled it, or offered so to do. The evidence was excluded upon objection by the plaintiff.

It was said by both counsel, and such would seem to be the fact from the evidence, that the plaintiff received his stock certificate after the commencement of this action. If so, it was necessarily after he had knowledge of the fraud of which he complains; and the act was a ratification and affirmance of the contract. He could not, with knowledge of the fraud which had been practiced upon him, take any benefit under the contract, or change the condition of the property, the subject-matter of the contract, and then repudiate the contract. The taking of a benefit is an election to ratify it, and concludes him. He cannot be allowed to deal with the subject-matter of the contract, and afterward disaffirm it. The election is with the party defrauded to affirm or disaffirm the contract; but he cannot do both. (*Masson* v. *Bovet*, 1 Denio, 69.) By accepting the stock certificate, he elected to abide

by the purchase. But, if the certificate of stock was received before the commencement of the action, and before the plaintiff had knowledge of the fraud, he was bound, upon a rescission of the contract, to restore to the defendants all that he had received from them, and all that he had acquired under it; to place the defendants in *statu quo*, as near as practicable. The law not only requires a disaffirmance of the contract at the earliest practicable moment after discovery of the cheat, but a return of all that has been received under it, and a restoration of the other party to the condition in which he stood before the contract was made.

To retain any part of that which has been received upon the contract is incompatible with its rescission. (*Masson* v. *Bovet*, *supra*; *Voorhees* v. *Earl*, 2 Hill, 288; *Hogan* v. *Weyer*, 5 id., 389.)

The contract, although fraudulent, was not, *ipso facto*, void, but only void at the election of the plaintiff, and a return of what he had received under it. Where a party had parted with goods for the note of a third person, upon the fraudulent representations of the purchaser as to the solvency of the maker, and had recovered a judgment upon the note, the court held that he could not rescind the sale without tendering an assignment of the judgment. (*Baker* v. *Robbins*, 2 Denio, 136.)

The evidence offered was material upon the question of affirmance of the contract, as well as in respect to the acts necessary on the part of the plaintiff to a rescission of it, and upon the right of the plaintiff to recover the money paid, and should have been admitted. If the fact had been proved, as offered, that the plaintiff had received and kept his certificates of stock, a transfer or delivery of these certificates, or a tender to the defendants, was necessary to a complete rescission of the contract, and the evidence offered was competent and material. It follows that the order granting a new trial must be affirmed and judgment absolute given for the defendants.

This is a fit case to allude to the hazardous practice which is becoming so general, of risking an appeal to this court from an order granting a new trial, with a stipulation, made neces-

sary by statute, that in case the order is affirmed, judgment absolute shall be given against the party appealing. There is but a single class of cases, and the individual cases coming within it are rare, in which this course can prudently be adopted. It is only proper and admissible, when the sole question that can be presented upon the record, relates to and will determine the merits of the controversy, unembarrassed by incidental questions affecting the trial, but not necessarily decisive of the true merits of the litigation. If every fact that can affect the result has been upon the trial adjudged favorably to the party against whom the new trial has been granted, and no exceptions have been taken to the admission or rejection of evidence, or to the rulings upon minor or incidental questions in the progress of the trial, which, if well taken, will entitle the exceptant to a new trial; in other words, if the objections and exceptions taken at the trial, and to the recovery, cannot be obviated upon a second trial, but the verdict and judgment must necessarily be adverse to the party against whom the new trial has been granted, if the order and decision, stand an appeal from the order, with the stipulation for judgment absolute in case the order is sustained, may be advisable. But ordinarily, as in this case, there are exceptions, which, if well taken, will entitle the unsuccessful party to a new trial, but the decision of which will not finally or necessarily determine the merits of the action or the rights of the parties; and in such cases the exceptions must be clearly frivolous to justify the hazard of an appeal from the order granting a new trial, with the consent to a judgment absolute upon an affirmance of the order. The decision of the questions presented by the record in this case, were not necessarily fatal to the plaintiff, but they are made so by the appeal from the order, and the giving of the ordinary statutory stipulation, and the plaintiff loses the benefit of a second trial.

The order must be affirmed, and judgment absolute for the defendants.

All concur. Order affirmed.

EDWARD MEHL, Appellant, *v.* WILLIAM VONDERWULBEKE, Respondent.

An order made at General Term reversing a judgment absolutely, without granting a new trial, cannot be appealed from as an order. To review it, judgment should be perfected thereon, and an appeal taken from the judgment. The order alone is not a judgment.

(Argued November 22d, 1871; decided November 28th, 1871.)

APPEAL from an order of the General Term of the second judicial district, reversing a judgment entered upon the decision of the court at Special Term in favor of plaintiff.

The action was brought to enforce the specific performance of a contract to convey lands. It was tried at Special Term, and judgment rendered in favor of plaintiff. Upon appeal, this judgment was reversed and the complaint dismissed without costs. No judgment was entered upon the order of reversal.

J. A. Gross, for appellant.

M. Beach, for respondent. The appeal is from a judgment, none has been entered, as an order, it should have directed a new trial. (*Astor* v. *L'Amoreaux*, 8 N. Y., 107; *Meyer* v. *City of Louisville*, 26 Barb., 609; *Marquat* v. *Marquat*, 12 N. Y., 336; *Edmondston* v. *McLoud*, 16 N. Y., 543.)

RAPALLO, J. The order made at General Term reversed the judgment at Special Term absolutely, granting no new trial. It could not, therefore, regularly be appealed from as an order. The proper mode of reviewing it was to cause judgment of reversal to be perfected, and to appeal from that judgment. The order alone is not a complete judgment. Judgment in pursuance of the order should have been perfected by being entered by the clerk in the judgment book. The order would then form part of the judgment roll. (Code, sections 279, 280, 281.)

No such judgment having been perfected, the objection

taken by the counsel for the respondent that the appeal was premature, must be sustained.

We should be induced to give the appellant an opportunity to rectify this omission did we think that the conclusion of the General Term was erroneous. But after a careful examination we are of opinion that it was not. If the only difficulty in the case consisted of the apparent want of equity in compelling the defendant to deliver a deed of his farm before the whole of the consideration of the sale became payable, a judgment might be so framed as to obviate that objection. But the second objection stated in the opinion of the court below, is insuperable. From the time of the alleged breach a part of the subject-matter of the contract has been constantly undergoing change, and the lapse of time has rendered a specific performance, according to the terms of the contract, impossible. The term of years which the defendant was to receive, as a part of the consideration, has now expired; and it is, and was at the time of the trial, impracticable so to frame a judgment as to enable the defendant to receive the stipulated consideration for the sale of his farm. The case is not one in which a decree of specific performance would do equity between the parties. If the plaintiff is entitled to relief, an action for damages is the appropriate remedy.

We think, therefore, that it would be of no avail to allow the appellant to perfect the record, and that the appeal should be dismissed with costs.

All concur.

Appeal dismissed.

WILLIAM G. SANDS, Receiver, etc., Respondent, *v.* SAMUEL LILIENTHAL et al., Appellants.

Under the provisions of the act of 1853, to provide for the incorporation of fire insurance companies (chap. 466, Laws of 1853), a personal demand of the maker of a premium note, given to a mutual fire insurance company, is only made necessary, where it is sought to recover a judgment for the entire note, as a penalty for neglecting to pay a partial assessment thereon.

Assessments upon notes given prior to the passage of the act were unaffected by it, and could be recovered without such demand.

Where, therefore, a premium note given prior to 1853 was regularly assessed to its full amount, the time of payment fixed, and notice of the assessment duly published, as required by the charter and by the laws of said company, the whole note became due and payable upon the day fixed for its payment, and after the lapse of six years therefrom, an action upon it is barred by the statute of limitations.

(Argued November 20, 1871; decided November 28, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the sixth district, affirming judgment entered upon report of referee in favor of plaintiff.

This action was brought by plaintiff, as receiver of the Ætna Insurance Company of Utica, on a promissory note executed by defendants to said company for $500.

Said company was duly formed and incorporated by virtue of the act entitled "An act to provide for the incorporation of insurance companies," passed April 10, 1849, and said corporation was duly organized under said act, in March, 1851.

The note in suit was dated May 8, 1851, and was payable "at such time and times, and in such portions, as the directors of said company may, agreeably to their charter and by-laws, require."

On the 23d day of June, 1860, the said company assessed the note to its full amount, for losses accruing in said company, and fixed the time for its payment, the 22d day of August, 1860, and of which fact the required notices by publication were given.

Statement of case.

Personal demand of payment of said assessment was made of defendants, respectively, on the 29th and 30th days of November, 1867, and this action was commenced on the 21st day of December, 1867.

Defendants claim the action was barred by the statute of limitations, and plaintiff claims, under a statute passed in 1853, and amended in 1862 (see Edmonds' Satutes, vol. 4, p. 231), the thirteenth section of which provides, that "the directors shall, as often as they deem necessary, after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage, settle and determine the sums to be paid by the several members thereof, as their respective portion of such loss, and publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed; and the sum to be paid by each member, shall always be in proportion to the original amount of his deposit, note or notes, and shall be paid to the officers of the company within thirty days next after the publication of said notice; and if any member shall, for the space of thirty days after the publication of said notice, and after personal demand for payment shall have been made, neglect or refuse to pay the sum assessed upon him as his proportion of any loss, as aforesaid, in such case the directors may sue for and recover the whole amount of his deposit, note or notes, with costs of suit; but executions shall only issue for assessments and costs as they accrue, and every such execution shall be accompanied by a list of the losses for which the assessment is made," that the statute of limitations did not run, until both valid assessment and personal demand of the payment of the note.

J. B. Elwood, for appellants. Note was a stock note. (*Howland* v. *Edmonds*, 24 N. Y., 307; *White* v. *Haight*, 16 N. Y., 310.) It was due at its date and the action barred by statute of limitations. (Cases *supra*; *Tuckerman* v. *Brown*, 33 N. Y., 297; *Sands* v. *St. John*, 23 How., 140.) Section

13 of act of 1853 does not extend the statute. (*Utica Ins. Co.* v. *American Mut. Ins. Co.*, 16 Barb., 171; *Allen et al.* v. *Hud. Riv. Mut. Ins. Co.*, 19 Barb., 442; *Stafford* v. *Richardson*, 5 W., 302; Code, § 348; *Bruyn et al.* v. *Comstock, etc.*, 56 Barb., 9.) Interest on the note not recoverable. (23 Barb., 591; 37 Barb., 634 R. S.; Edmonds' Ed., p. 231; § 13 of act of 1853; also p. 200, act of April 8, 1848.)

Henry R. Mygatt, for respondent. The note was not a capital stock or formation note. (*Bell, Rec'r*, v. *Shibley*, 33 Barb., 612; *Birdseye, Rec'r*, v. *Smith*, 32 Barb., 217, 218.) Statute of limitations no bar to the action. (*Devendorf, Rec'r*, v. *Beardsley*, 23 Barb., 656; *Sands, Rec'r* v. *St. John*, 36 Barb., 634; *Howland, Rec'r*, v. *Cuykendall*, 40 Barb., 321; 2 R. S., 5th ed., 757, § 44; *Savage* v. *Medbury*, 19 N. Y., 32; 26 N. Y., 249; *Mickler* v. *Indiana Turnpike Co.*, 3 Penn., 149.) Interest recoverable from time assessment was due and payable. (*Hyatt, Rec'r*, v. *Wait*, 37 Barb., 43.)

GROVER, J. Although the complaint avers, that the note in suit formed but part of the capital stock of the company, yet the other averments show that it was not a stock, but a premium note. This is also shown by the facts proved upon the trial.

The company was organized in March, 1851, under the act of 1849, providing for the organization of insurance companies. The note was made May 8, 1851, for a policy of insurance, in the form of a premium note. The plaintiff was duly appointed receiver, upon the insolvency of the company, prior to June 23, 1860, and on that day assessed the note, to its full amount, for losses occurring during the life of the policy, for the premium upon which the note was given, and fixed, for the time for its payment, August 22, 1860, and, in due form, published the requisite notices of said assessment, more than thirty days prior to the time fixed for the payment thereof. The action was commenced on the 21st of December, 1867.

The defendant, in his answer, sets up the statute of limita-

tions as a defence to the action. More than six years had elapsed from the time the assessment became due and payable, according to the charter and by-laws of the company, prior to the commencement of the action. An action for the recovery of this assessment was barred by the statute of limitations. The note was given while the act of 1849 was in force, and by its terms made payable in such portions and at such time or times, as the directors of said company may agreeable to their charter and by-laws require.

The plaintiff, by his appointment as receiver, became substituted in the place of the directors, for the purpose of requiring payment of premium notes, whenever requisite for the payment of the losses and expenses of the company, and his assessment and notices were equivalent to that of the directors, prior to the insolvency of the company. The assessment having been made to the entire amount of the note, which had become due and payable—in other words, payment of the whole note having been required, and thus become due and payable more than six years before the commencement of the action—it is clear that the statute bars the action unless such bar is obviated by section 13 of the act to provide for the incorporation of the insurance companies. (Laws of 1853, 910.) That provides that the directors shall, as often as they deem necessary, "after receiving notice of any loss or damage by fire sustained by any member, and ascertaining the same, or after the rendition of any judgment against said company for loss or damage, settle and determine the sums to be paid by the several members thereof, as their respective portion of such loss, and publish the same in such manner as they shall see fit, or as the by-laws shall have prescribed; and the sum to be paid by each member shall always be in proportion to the original amount of his deposit note or notes, and shall be paid to the officers of the company within thirty days next after the publication of said notice; and if any member shall, for the space of thirty days after the publication of said notice, and after personal demand for payment shall have been made, neglect or refuse to pay the sum

assessed upon him as his proportion of any loss, as aforesaid, in such case the directors may sue for and recover the whole amount of his deposit note or notes, with costs of suit; but execution shall only issue for assessments and costs as they accrue."

The position of the counsel for the respondent is, that the effect of this section, is to preclude the right to maintain any action upon the note, or for the recovery of any assessment thereon, until a personal demand for the payment of the assessment shall have been made, and he cites numerous cases where it has been held, that the action would not lie in the absence of such demand. But these were actions for the recovery of the entire note, and generally upon notes made after the act of 1853 was passed, which by section twenty was made applicable to companies organized under the act of 1849. But the note in the present case was given in 1851, and in no case has the question, whether an assessment upon such a note can be recovered without a personal demand, arisen, much less been decided that it could not, such a decision would materially modify the contract. That is, to pay in such portions, and at such time or times, as the directors may, agreeable to their charter and by-laws require. The right so to recover was vested in the company, and it may well be doubted, whether it was competent for the legislature to impose any restrictions upon the exercise of this right. But it is unnecessary to determine this question, as no such attempt has been made by the section under consideration. A personal demand is only thereby made necessary, when it is sought to recover a judgment for the entire note, as a penalty for neglecting to pay a partial assessment thereon. Whether assessments, without a personal demand, can be recovered upon notes made after the passage of the act of 1853, is a question not arising in the present case. Be that as it may, it is clear that such assessments upon notes made before that time may be so recovered. Personal demand in the present case was made the latter part of November, 1867. This was after the statute had run upon the assessment.

It would be singular indeed, if a refusal to pay a partial assessment, upon a premium note barred by the statute upon personal demand, should render the party liable to the recovery of a judgment for the amount of the note, including such assessment. And yet that does not differ from the present case. Here the assessment was the entire note. The whole note had thus become due, and barred by the statute, and the personal demand did not revive it. This renders it unnecessary to consider the other grounds, upon which the bar of the statute was sought to be maintained by the counsel for the appellant. The judgment appealed from must be reversed, and a new trial ordered, costs to abide the event.

All concur. Judgment reversed.

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IN THE MATTER OF THE PETITION OF THE NEW YORK AND HARLEM RAILROAD COMPANY, Respondent, *v.* ELBERT S. KIP AND ELIZABETH KIP, Appellants.

Statutes delegating the right of eminent domain to railroad and other corporations for public use, being in derogation of common right, are not to be extended by implication, and must be strictly complied with. Yet they are not to be construed so literally, as to defeat the evident purposes of the legislature.

The powers granted will extend no farther than is expressly stated in the act, or than is necessary to accomplish its general scope and purpose. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt will be solved adversely to the claim of power.

Passenger depots; convenient and proper places for the storing and keeping of cars and locomotives; proper, secure, and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before delivery, are among the acknowledged necessities for the running and operating a railroad, and the right to take lands for those purposes, is included in the grant of power given by the general railroad act as amended in 1869 (Laws of 1869, chapter 287, section 1), which authorizes railroad corporations, to acquire real estate "for the purposes of its incorporation, or for the purpose of running or operating" its road.

Statement of case.

It is no objection to proceeding under that act, that there are other lands in the same vicinity equally well adapted for the purpose, which possibly might be acquired by purchase. The location of the buildings and structures of the company is within the discretion of its managers, and courts will not supervise it ordinarily.

A usufructuary right, either temporary as to its continuance, or limited as to its character, does not give to the company the property which it has a right, under the statute, to acquire. And whenever the proper running and operating its road, and the interests of the public require permanent structures, it is no objection to a proceeding to acquire the land in fee, that the company is a lessee of the premises for a term of years.

(Argued November 21st, 1871; decided November 28th, 1871.)

Appeal by Elbert S. Kip, and wife, from an order of the General Term of the Supreme Court in the first department, affirming an order made at Special Term, appointing commissioners to appraise lands required by the applicant, the New York and Harlem Railroad Company, for the purposes of operating its railroad. The proceeding was initiated under the authority conferred by the amendment of the general railroad act in 1869, upon railroad corporations, to take the property of individuals for railroad purposes.

The premises sought to be condemned by the proceedings, consisted of a plat of ground in the city of New York, between Forty-seventh and Forty-eighth streets, and Fourth and Lexington avenues. The property had been leased by the applicant of the present appellants in 1858, for the term of twenty-one years, at an annual rent of $5,000, and has been, and is now used for the purposes of the road, in connection with the transportation and delivery in New York, of hay, milk, and general freight. The present application is made upon the ground, that the great increase of the business of the road, in connection with the necessary changes made, and being made in its depots and warehouses, render it necessary to erect upon the plat of ground in question, permanent and very expensive structures, and that such structures ought not, and cannot prudently be put upon premises in which the applicant has but a short term.

The appellants objected that other property in the vicinity,

equally accessible and convenient, could be had, and that so long as the applicant had a right to the present possession and use of the premises under the lease, the statute did not authorize a proceeding to condemn the reversion, or to secure the fee of the property to meet the future requirements of the company. The Supreme Court overruled the objections, sustained the application and granted the order appointing commissioners to appraise the land, and that order is brought by appeal to this court.

E. S. Gerry, for appellants. The statutes authorizing this proceeding are to be strictly construed. (*R. and S. R. R. Co.* v. *Davis*, 43 N. Y., 137; *Webb* v. *M. and L. R. Co.*, 1 Eng. Rail. Cases, 439; *In re W. and C. R. R. Co.*, 56 Barb., 456; *Sharp* v. *Johnson*, 4 Hill, 92, 99; *Sharp* v. *Spier*, 4 Hill, 76; *Sprague* v. *Birdsall*, 2 Cow., 419; *Vanwickle* v. *Cam. and Am. R. R. Co.*, 2 Green (14 N. J. L.), 162; *State* v. *Jersey City*, 1 Dutch. (25 N. J. L.), 309; *Adams* v. *Saratoga R. R. Co.*, 10 N. Y. (6 Seld.), 328; *Vanhorne* v. *Dorrance*, 2 Dallas, 304; *Bradley* v. *N. Y. and N. H. R. R. Co.*, 21 Conn., 291; *Morehead* v. *S. M. R. R. Co.*, 71 Ohio, 340, 341; Palairet's Appeal, 3 Phil. Legal Gazette, 169.) The land is not needed "for the purposes of its incorporation," and cannot be taken for warehouse purposes. (*Morehead* v. *L. M. R. R. Co.*, 17 Ohio, 341; *Webb* v. *M. R. Co.*, 4 M. & C., 116; *Garside* v. *Proprietors of Trent and Mersey Navigation*, 4 T. R., 581; *Thomas* v. *Boston, etc., R. R. Co.*, 10 Metc., 472; *Norway Plains Co.* v. *Boston, etc., R. R. Co.*, 1 Gray, 263; *Illinois Central R. R. Co.* v. *Alexander*, 20 Ill., 23; *Richards* v. *Mich. Southern, etc., R. R. Co.*, 20 Ill., 404; *Porter* v. *Chicago, etc., R. R. Co.*, 20 Ill., 407; *Davis* v. *Mich. Southern, etc., R. R. Co.*, 20 Ill., 412; *People* v. *N. Y. and Harlem R. R. Co.*, 45 Barb., 78, 80; *Dry Dock R. R. Co.* v. *N. Y. and Harlem R. R. Co.*, 30 How. Pr. R., 47–49, in point.) It cannot be taken to save the company part expense. (*Lloyd* v. *Chat., Lond. and Dover Railroad*, 11 Jurist., N. S.. 385; *Great N. R. R. Co.*,

v. *Manchester S. and L. R.*, 10 Eng. L. & E. R., 11; Redfield on Railroads, § 213; *Flower* v. *L. B. and S. R. Co.*, 2 De Ger. & S., 330, 334, 336.) It can only be taken for the necessities, not the convenience of the company. (Plairet's Appeal; *The C. R. Co.* v. *Greeley*, 17 N. H., 57; *Lindsay* v. *Connors*, 2 Bay. & C., 6; *State* v. *Com'rs of Ill.*, 23 N. J., 510; *Mayor of A.* v. *O. and P. R. R. Co.*, Penn., 360; *S. W. R. Co.* v. *Board of H.*, 4 E. & B., 189.) The present application not justified by any public necessity, and the right of eminent domain extends no further. (*Bennett* v. *Boyle*, 40 Barb., 557; *Varick* v. *Smith*, 5 Paige, 137, 159; S. C., 9 id., 557, 559; *Beekman* v. *Saratoga, etc., R. R. Co.*, 3 id., 45, 73; *Bloodgood* v. *Mohawk and Hudson R. R. Co.*, 18 Wend., 9; *People* v. *Sup. of Westchester*, 4 Barb., 64, 75; *Matter of Albany St.*, 11 Wend., 149; *Matter of J. and C. Streets*, 19 Wend., 659; *Embery* v. *Conner*, 3 Com., 511; *Nesbet* v. *Swanby*, 39 Ill., 110; *Clark* v. *White*, 2 Swan, 540; *Hoge* v. *Swan*, 5 Md., 237; *Ten Eyck* v. *Delaware and R. R. R. Co.*, 3 Ham. (18 N. J. S.), 200; *Jinsman* v. *B. and D. R. R. Co.*, 2 Dutch (24 N. J. S.), 48; *Costar* v. *I. W. Co.*, 18 N. J. Eq. (3 E. C. Green), 54, 518; *Parham* v. *Justices D. Co.*, 9 Ga., 341, 353; *Powers* v. *Bergen*, 6 N. Y., 358, 367; *People* v. *White*, 11 Barb., 24, 32; *White* v. *White*, 5 Barb., 474, 485; *Embury* v. *Connor*, 3 Comst., 571; *Taylor* v. *Porter*, 4 Hill, 140; *Sadler* v. *Langham*, 34 Ala., 311, 332; *Warne* v. *Smith*, 5 Paige, 159; *Wilkinson* v. *Leland*, 2 Peters, 627, 657; *State* v. *Brown*, 27 N. J. S. (3 Dutch), 13, 28; W. B. and B. Co., 6 How. U. S., 507; Lancis' Appeal, 55 Penn., 16; *M. S. Co.* v. *Mayor, etc.*, 4 Caldwell, 419; *Eldridge* v. *Smith*, 34 Vt., 484, 496; *State* v. *M. and E. R. R. Co.*, 25 N. J. S., 437; *Baldwin* v. *M. of N. Y.*, 2 Keyes, 394; *Adder* v. *Ball*, 3 Dall., 147.) As the company has a lease, the proceeding is premature and unnecessary, and is an effort to impair the obligation of a contract. (*W. R. R. Co.* v. *Dix*, 6 How. U. S., 516; *Young* v. *Harrison*, 6 Ga., 130; *Ford* v. *Tiley*, 6 Barn. & Cres., 325; *Bowdell* v. *Parsons*, 10 East, 359; *Elderton* v. *Emmons*,

4 House of L. Cas., 624; *Atterson* v. *Stevens*, 1 Jurist, 196.) A legislative enactment cannot vitiate a contract, and the company cannot do so by invoking the rights of eminent domain. (*Brooklyn Park Com'rs* v. *Armstrong*, 44 N. Y.; *Lloyd* v. *S. C., and D. R.*, 11 Jurist U. S., 385; *Henderson* v. *R. R. Co.*, 17 Texas, 577–9; *McCarty* v. *Sadler*, 12 Cal., 531; 2 Kent Com., 340; 2 Story on the Constitution, § 1385; *Dartmouth College* v. *Woodward*, 4 Wheat. R., 625; *Fletcher* v. *Peck*, 6 Cranch, 137; *Charles River Bridge* v. *Warren, Bridge et al.*, Peters' S. C. R., 578.) The Constitution authorizes the taking of land for public use, not the taking of the title of land already subjected to public use. (*Edgerton* v. *Huff*, 26 Ind., 35; *Giesy* v. *C. and C. R. R.*, 4 Ohio, 308.)

M. Beach, for respondent. The corporation is the only judge of what property is most appropriate to its wants. (*Oswego Bridge Co.* v. *Fish*, 1 Barb. Ch., 547; *Lund* v. *Midland R. R. Co.*, 34 L. J., Ch. 276; 1 Redfield on Railways, 236; *Stockton and Darlington R. R. Co.* v. *Brown*, 9 H. of Lord's Cases, 246.) All required to be shown as a reasonable, not an absolute, necessity. (*Boston Waterpower Co.* v. *B. and W. R. R. Co.*, 23 Pick., 360; *B. and N. Y. R. R.* v. *Brainerd*, 9th N. Y. R., 100.) The lease does not affect the proceedings. The power of the State to resume title is implied in every conveyance. The lease is subject to the same conditions. (*Doo* v. *The London and Croydon R. R. Co.*, 1st Railway Cases, 257; *Stone* v. *Commercial Railway Co.*, 4th Mylne & Craig, 121; *Mason* v. *Stokes Bay and Pier Railway Co.*, 32 Law J. Chan., 110.)

ALLEN, J. That the land and premises, the title to which, the applicant seeks to acquire by these proceedings, are required for the purposes of the corporation is beyond dispute, as is also the fact that the corporation has been unable to agree for the purchase, by reason of the unwillingness or inability of the owners, the present appellants, to treat for the sale of the same for railroad purposes.

The best, and highest evidence of the necessities of the applicant is, that since 1858, the company has been in the actual use and occupation of the land at a large annual rent, and at a large expenditure for structures thereon, for purposes connected with the running and operating its railroad. While courts will not allow railroad corporations to avail themselves of the statutory grant of power, to take lands *in invitum*, by taking that which they do not require for a *bona fide* purpose, sanctioned by the act of the legislature, when really required in good faith for the purposes of the act, they will not interfere to prevent the taking. (*Webb* v. *The Manchester and Leeds R. Co.*, 4 Mylne and Craig, 116.) It is now quite too late to object, that the objects and purposes of railroad corporations are not public, or that the duties devolved upon them, and the services rendered by them are not of a public character, and in furtherance of public interests.

The public have an interest in the use of a railroad, and in the proper performance of every power within the franchise conferred upon a railroad corporation, and hence every facility needed by such corporation is for public purposes, and whatever is required to enable the corporation to perform its duty to the public, is within the principle which permits a delegation of power to it. The right of eminent domain, which is but a right of the people or government to resume the possession of lands for public use, and subject to which right property is always held, may be delegated to individuals, corporations or municipalities for like use, and that the construction and operating of a railroad is such a use as justifies a delegation of this right is now beyond question, and is not open for consideration. (*In re R. & S. R. Co.* v. *Davis*, 43 N. Y., 137; *Beekman* v. *Saratoga and Schenectady R. Co.*, 3 Paige, 45.) It is undoubtedly true, as claimed in behalf of the appellants, that the grant of power being in derogation of common right is not to be extended by implication, and that the act conferring the power must be strictly complied with. These principles are elementary. But statutes granting these powers are not to be construed so literally,

or so strictly as to defeat the evident purpose of the legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no further than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. If there remains a doubt as to the extent of the power, after all reasonable intendments in its favor, the doubt should be solved adversely to the claim of power. The purposes for which lands may rightfully be condemned to the uses of a railroad company are not necessarily confined to those needful for the track, but the legislature may confer the right to take lands compulsorily, for all needful purposes of the road and works proper and necessary to enable it to perform the public service authorized by its charter. The extent of the power depends upon the terms of the grant. The act under which the power is sought to be exercised by the present applicant, authorizes the taking of any such estate which it shall require, "for the purposes of its incorporation, or for the purpose of running or operating its road." (Laws of 1869, chap. 237, § 1.) The language of the act is very general and comprehensive. If lands are required for any of the purposes of the incorporation, or for the purpose of operating and running the road, that is, in the proper enjoyment and exercise of the franchise conferred, and in the performance of the service to the public assumed by it, they may be taken *in invitum*. The only limit to the power is the reasonable necessity of the corporation in the discharge of its duty to the public. The right to take lands upon which to erect a manufactory of cars, or dwellings for operatives, is not included in the grant. Such purposes are not legitimately and necessarily connected with the management, the running and operating of the railroad. (*Eldridge* v. *Smith*, 34 Vt., 484; *Brainerd* v. *Peck*, id., 496.) Neither can lands be taken for a mere subsidiary or extraordinary purpose. But passenger depots, convenient and proper places for the storing and keeping cars and locomotives when not in use, proper, secure and convenient places having reference to the public interests to be subserved, for the receipt

and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad, to the proper prosecution of the business in the interests of the public. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant.

The purpose and object for which these lands are required are clearly within the scope of the grant. In *The Rensselaer and Saratoga Railroad Company* v. *Davis* (*supra*), the application was not for the *bona fide* purposes of the corporation, but for speculative purposes, and in fraud of the act conferring the power. The lands were not wanted for any legitimate purpose authorized by the act; and the court, in the just exercise of the power vested in it, to supervise and control the discretion of corporations in the exercise of statutory powers, and following well established precedents, by its decision prevented the appropriation of individual property to private use. (*Flower* v. *London, Brighton and South Coast. R. Co.*, 2 Drew & Sm., 330.) It is claimed that there are other lands in the same vicinity, equally well adapted to the use of the applicant, as those sought to be acquired by these proceedings, and which, possibly, might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company, is within the discretion of the managers, and courts cannot supervise it. The legislature has committed to the discretion of the corporation the selection of lands for its uses, and if the necessity of lands for such purposes is shown and the lands sought are suitable, the courts cannot control the exercise of the discretion, or direct which of several plats of ground shall be taken. If the taking of one plat of ground in preference to another could be shown to work great mischief, and result in great loss, which could be prevented by taking another, and the proceeding to take one

parcel compulsorily, in preference to another equally well adapted to the uses of the company, is from some unworthy or malicious motive, and not in the interests of the public, the court might entertain the question, and in the exercise of a sound discretion withhold its consent to the appropriation. But in this case there are good reasons, resulting from the present occupation of, and the expensive improvements put upon these premises by the appellant, why they should be taken if suitable and proper for the purposes required, the owners not claiming that they will sustain any especial injury peculiar to themselves, which would not be sustained by the owners of adjacent lands, if taken.

The only other question that need be considered, is the objection that there is no present necessity for these proceedings, for the reason that the applicant is now the lessee of the premises for a term having several years yet unexpired, with the right to occupy them for any of the purposes of the incorporation. The evidence shows that since the taking of the lease by the applicant, the business of the road has greatly changed in character, as well as increased in amount and volume; that the growth and increasing commerce of the city has made necessary great and material changes in the location of the depots, freight and car-houses, and other works and structures of the company; that the protection of the city against fires, as well as the proper security and protection of property intrusted to the corporation, while legitimately in its custody in the prosecution of its authorized business, as well as to enable it to furnish to the public the reasonable and proper facilities, which are demanded by the necessities of the appropriate business of the corporation, require that the present temporary and combustible structures on the lands should be removed, and larger and more permanent structures take their place, less liable to destruction by fire, and which would furnish a better and more desirable, as well as more safe and secure, deposit for goods, while necessarily in its custody, and that such improvements would cost at least $125,000. The making of these improvements

are directly in and for the public interests, and not merely a matter of convenience or profit to the corporation. The public cannot reasonably require these expensive and permanent buildings, to be put upon lands of which the railroad company is not the owner, and of which it has the use for a period less than ten years, without the privilege of a renewal of the lease, or a right to purchase the premises at the expiration of the term. The value of the materials upon a removal of the buildings would be but trifling compared with the cost and value of the buildings themselves. The necessity is a permanent necessity, and the uses are permanent and not temporary. The right to use the property under the lease is temporary, and does not supply the permanent necessities of the company. A usufructuary right either temporary as to its continuance, or limited in its character, does not give to the applicant, the property, the land which it has a right under the statute to acquire for its purposes. Whenever the interest acquired under its lease, is not such an interest as the proper running and operating its road requires, there can be no good reason why proceedings may not be taken to acquire the land in place of the term under the lease. The necessity is a present necessity, having respect to the present wants of the public, and the application is based upon the present business of the corporation, and the wants of the public, and not upon any future and contingent or conjectural needs, either of the corporation or the public. The taking of the lease does not create an estoppel against this application. The application is not to condemn the rent, or the right to the rent for the term. It is to acquire the land, subject to the lease, the remedy which has become necessary for the purposes of the corporation.

The order must be affirmed with costs.

All concur save RAPALLO, J., having been of counsel not sitting.

Order affirmed.

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CHRISTOPHER MURPHY, Appellant, *v.* MARIA SPAULDING, impleaded, etc., Respondent.

Plaintiff in his complaint in an action upon a contract for the sale of lands, asked judgment directing a specific performance; or in case a conveyance was impracticable, damages for non-performance. The referee decided that he was not entitled to a conveyance, but gave him damages for the non-performance. Defendant, M. S., to whom the lands in question had been conveyed, entered as much of the judgment as denied a specific performance, and plaintiff entered the portion in his favor, and appealed from the former part.

Held, that the provisions of the judgment are connected and dependent, that the part appealed from should not be reversed without a reversal of the other; that plaintiff's entry of the part of the judgment in his favor, and taking no appeal therefrom, gave the court no authority to reverse it, was an election to accept it, and a waiver of his right to appeal. Appeal therefore dismissed.

(Argued November 22d, 1871; decided November 28th, 1871.)

THIS is an appeal by the plaintiff from a judgment rendered, upon the report of a referee, in favor of the defendant, Spaulding, against the plaintiff, and affirmed at a General Term of the Supreme Court in the second district.

The action was brought against Maria Spaulding and Walter Sands, to compel the specific performance of a contract made between the plaintiff and Sands for the conveyance of a lot of land on Staten Island, in the county of Richmond, made on the 3d day of April, 1866. The complaint asked judgment that defendant be compelled to convey, or if such conveyance was impracticable, that Sands be compelled to pay damages.

The property in question was owned by one David Sands of the county of Ulster, who died, leaving a will, in which he devised all his real estate to executors and trustees, in trust, with a power of sale, of whom one George W. Sands was the survivor; and he, on the 23d November, 1861, made an agreement to sell the lot in question to the defendant, Spaulding, for fifty dollars. And at that time she paid eighteen

dollars and twenty-two cents on the contract, and the deed was to have been delivered on the 1st of May, 1862.

It appears that nothing more was done under this contract until after the month of April, 1866.

After the death of George R. Sands, sole executor and trustee of the will of David Sands, deceased, and in or about the year 1855, Walter Sands, one of the defendants, was appointed trustee by the Supreme Court in the place of George W. Sands, deceased.

On the 3d of April, 1866, Walter Sands agreed in writing to sell the lot in question to the appellant, Murphy, for seventy-five dollars, and received ten dollars on account of the purchase-money.

On or about the 12th of April, 1866, defendant, Spaulding, commenced an action in the Supreme Court against the defendant, Walter Sands, in his representative capacity, to enforce the performance of the contract made with George W. Sands, and he was enjoined from disposing of the lot, and, on the 23d of June, 1866, the defendant, Sands, as trustee, conveyed the lot in question to Spaulding.

The referee found, among other things, that the defendant, Sands, at the time of the execution of the agreement with the plaintiff, knew of the existence of the prior agreement made by George W. Sands to Spaulding.

That on the 22d of June, 1856, the defendant, Sands, in good faith executed and delivered the deed of the property to Spaulding.

The referee, thereupon, ordered judgment in favor of Spaulding against the plaintiff with costs, and in favor of the plaintiff against Sands for eighty-one dollars and twenty-one cents with costs.

The former part of the judgment was entered on motion of counsel for defendant, Spaulding, and the latter on motion of plaintiff's counsel. Plaintiff appealed from the judgment "except so much as in favor of the plaintiff on the merits, and as to costs against the defendant, Walter Sands."

J. H. Reynolds, for appellant. The delay of defendant, Spaulding, in seeking to enforce her contract, was a bar to equitable relief. (Sugden on Vendors, 278; 2 Story Eq. Jour., § 776; *Southcourt* v. *Bishop of Exeter*, 6 Hare., 219 (31 Eng. Ch. R.); *Harrington* v. *Wheeler*, 4 Vesey, Jr., 687; *Lloyd* v. *Collett*, 4 Bro. Ch. C., 469; *Benedict* v. *Lynch*, 1 J. C. R., 378; *Chase* v. *Hogan*, 3 Abb. R., N. Y., 57; *Bruce* v. *Tilson*, 25 N. Y., 194.) She should seek her remedy in damages, and plaintiff should have the property. (*Benedict* v. *Lynch*, 1 John. Ch., 378.)

S. E. Church, for respondent. Plaintiff obtained one of the two forms of relief sought, has accepted it, and cannot appeal. (*Bennett* v. *Van Syckle*.) Specific performance a matter of discretion. Story Eq. Jour., §§ 750, 750*a*, 751; *Slocum* v. *Slosson*, 1 How. App. Cases, 750, 758; *Clark* v. *Rochester and Niag. R. R. Co.*, 18 Barb., 350; *St. John* v. *Benedict*, 6 J. C. R., 111; *Mills* v. *Van Voorhis*, 23 Barb., 125; 1 N. Y., 210; 3 Edw., 213; 3 Sandf., 72; *Hatch* v. *Cobb*, 4 J. C. R., 559; *Kempshall* v. *Stone*, 5 id., 193; *Morse* v. *Elmandorf*, 11 Paige, 279; 6 J. C. R., 222; 3 Con., 445.) Plaintiff knew of respondent's equities, and had he obtained a deed, would have been compelled to convey to her. (Sto. Eq., §§ 784, 788; 6 J. Ch., 402.) Respondent had not forfeited her right by delay. (*Stevenson* v. *Maxwell*, 2 N. Y., 408; 8 N. Y., 50; *Badner* v. *Conradt*, 13 N. Y., 108; *Frey* v. *Johnson*, 32 How., 316.)

FOLGER, J. The plaintiff in his complaint asks judgment that the defendant Sands, be compelled to grant and convey the premises to him, or if such conveyance is impracticable, that the defendant be adjudged to pay him damages for not conveying. He has well placed these two kinds of relief in the alternative, for it is evident that one is inconsistent with the other. One cannot at the same time have conveyance to him of lands, and damages for the non-conveyance of them. The judgment entered upon the report of the referee, that

the plaintiff was not entitled to a conveyance, but was, to damages for non-conveyance, was consistent. The plaintiff, however, could appeal from any specified part of it. (Code of Proc., § 327.) But the appellate court cannot properly reverse the judgment as to the part specified by the plaintiff and allow the part not complained of by him to stand. The provisions of the judgment are connected and dependent. The parts specified by the notice of appeal should not be reversed without a reversal of the other. (*Bennett* v. *Van Syckel*, 18 N. Y., 481.) If it should be found on review that the plaintiff is entitled to a conveyance of the premises, and conveyance must be adjudged, then he is not entitled to damages because a conveyance is not and cannot be made. And then to do justice to all, the whole of the judgment should be reversed.

If then, the plaintiff has elected to accept the judgment so far as it is in his favor, he cannot appeal from it so far as it is not.

All that there is in the papers which shows an election by the plaintiff, is the motion for judgment for him and the entry of it by his attorney. The plaintiff was not obliged to enter that part of the judgment which was in his favor, to enable him to appeal from the other part, which was in favor of the defendant Spaulding, and was entered on motion in behalf of her. So that his action in that regard cannot be charged to that motive. His joining in the entry of judgment, we must infer was to secure to himself the advantageous part of it. By entering it he has claimed the right which the judgment gave him, and he has it in his power at any time to enforce it. It is inconsistent to claim and accept this, and seek to avoid the other.

Again; the appellate court may reverse affirm or modify the judgment appealed from, in the respect mentioned in the notice of appeal (Code, § 330), and is confined thereto. (*Kelsey* v. *Western*, 2 Comst., 500.) The appellate court cannot then, disturb that part of the judgment favorable to the plaintiff. And this inability results in this case from the

plaintiff having caused the entry thereof and taken no appeal therefrom. It was an affirmative act on his part, which must be held to indicate his purpose to take and assert the right to damages given him by the judgment. The appeal should be dismissed, with costs to the respondent.

All concur.

Appeal dismissed.

JESSE M. EMERSON, Appellant, *v.* MILO H. PARSONS and LEVI S. PARSONS, impleaded, etc., Respondents.

The dissolution of a copartnership may be proved by parol, and a certificate signed by one of the copartners to the effect, that he has purchased the interest of the other members of the firm, is competent evidence upon the question, whether such an agreement was in fact made, and as corroborative of the alleged parol contracts.

A formal notice of dissolution, signed by all the partners and published, and a formal transfer of the partnership property to a third person, are not conclusive evidence of the time of dissolution.

(Argued November 24, 1871; decided November 28, 1871.)

APPEAL from a judgment of the General Term of the Superior Court of the city of New York, affirming a judgment in favor of defendants, entered upon a verdict and affirming an order denying motion for new trial. (Reported below, 2 Sweeny, 447.)

The action was for a balance of $833.33 due on an advertising contract, claimed to have been made with defendants and one Edward F. Baker as partners.

The partnership alone was contested.

That was proved on the part of plaintiff by the partnership articles of date 26 June, 1867, and plaintiff rested.

The defendants, Parsons, alleged and swore that the partnership was dissolved on the 3d September, 1867, and offered the following writing in evidence:

"This is to certify that I have purchased the interest of M. H. Parsons and Levi S. Parsons in the firm of E. F. Baker & Co., and I hereby agree to assume all liabilities of the said firm, and hold M. H. Parsons and Levi S. Parsons harmless.

"E. F. BAKER.

"NEW YORK, *Sept.* 3, 1867."

This was objected to by plaintiff, but received by the court, and the ruling excepted to.

The judge subsequently charged that this writing was evidence of the dissolution of the firm, together with the proof of parol dissolution. This part of the charge was excepted to by plaintiff.

The plaintiff then introduced the article of dissolution signed by all the firm, of date 5th December, 1867, dissolving the partnership. This dissolution was advertised in the newspapers. The plaintiff also gave in evidence a bill of sale of 5th December, 1867, signed by all the defendants.

The jury, after the charge of the court, found a verdict for defendants.

Plaintiff made a motion to set aside the verdict and for a new trial, upon the exceptions taken and for insufficient evidence, and which motion was thereupon entertained by the judge, who tried the cause, and after hearing argument thereon, denied said motion.

E. D. Culver, for appellant.

E. Patterson, for respondents. The denial of motion for new trial was correct. (*Allgro* v. *Duncan*, 24 How., 212; *Murphy* v. *Baker*, 3 Robt., 1; *Townsend Man. Co.* v. *Foster*, 51 Barb., 350; *Hall* v. *Morrison*, 3 Bos., 520; *Lewis* v. *Blake*, 10 Bos.) The only questions of law to be considered are those arising under exceptions taken at the trial. (*Morrison* v. *N. Y. and N. H. R. R. Co.*, 22 Barb., 571; *Ingersol* v. *Bostwick*, 22 N. Y., 425; *Hunt* v. *Bloomer*, 13 N. Y., 341; *Wheeler* v. *Garcia*, 40 N. Y., 585; *Meekings* v. *Cromwell*, 5 N. Y., 187; *Coon* v. *Syracuse and U. R. R.*, id., 492;

Brown v. *C. and S. R. R. Co.*, 12 id., 486; *Oatman* v. *Taylor*, 29 id., 649.) The purchase by Baker effectually determined the partnership.

CHURCH, Ch. J. The only exception taken in this case, was as to the admission of the paper of September 3d, signed by Baker, and certifying that he had purchased the interest of the other two members of the firm, in the firm, and agreeing to assume all the liabilities of the firm. There is also an exception to that part of the charge relating to "this writing," which it is claimed refers to the paper of September 3d, although other writings were introduced in evidence. Assuming this, the same question is substantially presented upon both exceptions, and that is, that this paper was inadmissible as evidence to prove a dissolution of the firm. The two members of the firm who defend this action, testified in substance, that the partnership was dissolved on the third of September, and that this paper was then executed and delivered by Baker as evidence of the dissolution.

The paper was not in the nature of a mere declaration of a third person, but was an act tending at least to show a dissolution. It was a part of the transaction which was claimed to be a dissolution of the partnership. A dissolution may be proved by parol. It may be partly by parol, and partly in writing, that is, there may be a parol agreement of dissolution, and a writing transferring the interest of one member to another, or an agreement to assume liabilities, and neither of them express in terms the agreement to dissolve. I apprehend such a writing, in part fulfillment of the parol contract, would be competent upon the question, whether such an agreement was in fact made, as corroborative of the alleged parol contract, and as a part of the transaction. The paper was not signed by all the parties, and does not state, in terms, that the partnership was dissolved; but it was executed by one party and delivered to the other two, and contained statements which, if true, would be presumptive evidence, at least, of a dissolution. It states that Baker had purchased the

interest of the other two members, and had assumed the liabilities of the firm. That would leave the two retiring members without any interest in the property or liability for the debts of the firm, and would constitute a dissolution. We can only regard this upon the question of competency. The effect which it was legitimately entitled to, upon the liability of the two retiring members, under the evidence in the case, seems not to have been presented on the trial so as to be reviewable here. If this partnership was open and notorious; if it was known that the Messrs. Parsons were members, and the plaintiff gave credit to the firm on their responsibility, or if they consented to the use of the firm name after dissolution, a private dissolution, not advertised, might not relieve them; but no such view seems to have been presented so as to raise a question of law.

On the fifth of December it seems that a formal notice of dissolution was signed by all the members and published, and a formal transfer of the property executed and delivered to a third party; and it is claimed by the learned counsel for the appellant that, as these papers, upon their face, show a dissolution on that day, they furnish conclusive evidence that the firm continued until that time, and had not been dissolved before. The answer to this position is, first, that the point does not seem to have been taken on the trial, and there is no exception bringing up the question; and, second, if there had been, it would not be tenable. It is true that these papers stated a dissolution on the day they were made, and, standing alone, would establish the fact that the firm continued up to that time; but they were not conclusive. It was competent, notwithstanding, to prove a dissolution at a previous time. They were open to explanation in this respect; and evidence was given tending to prove that, at the time of the dissolution on the third of September, it was understood that, when Baker found a purchaser, a more formal transfer was to be made and the dissolution advertised, and that these papers were made and signed in pursuance of such agreement. The judge, in his charge, properly submitted this, with the other

evidence, to the jury, to determine when the dissolution took place, and there was no exception to his charge in that respect.

The judgment must be affirmed.

All concur.

Judgment affirmed.

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ISAAC G. SANDS and JOEL S. WINANS, Appellants, *v.* CHARLES CROOKE, Respondent.

Sections 268 and 272 of the Code, which provide that a judgment shall not be deemed to have been reversed upon questions of fact, unless so stated in the order of reversal, apply only to cases tried by the court and a referee, and not to cases tried by jury.

If it appears in the latter case that the order granting a new trial was, or may have been granted upon questions of fact, this court will not entertain an appeal.

If exceptions appear in the case, which were well taken, the court would be justified in rendering judgment absolute for respondent, and they will only be examined, for the purpose of determining whether such judgment shall be rendered or the appeal dismissed.

Defendant owned a dock upon the Hudson river, which, prior to May 1st, 1867, had been used for freighting purposes, but was then not in use, which disuse detracted from its value. He entered into a parol agreement with plaintiffs by which he undertook, that in case they would carry on the freighting business from said dock and run a boat therefrom to the city of New York to the close of the season of navigation, he would guaranty them from all losses or damages incurred. Plaintiffs, in pursuance of the agreement, chartered a steamboat and conducted the business, as required, to the close of the season, and in so doing sustained a loss.

Held, that the risks and liabilities incurred by plaintiffs were a sufficient consideration for the promise of defendant, as was also the benefit secured to defendant's property; also, that the agreement was not void for want of mutuality.

(Argued November 23d, 1871; decided November 28th, 1871.)

APPEAL from order of the General Term of the Supreme Court in the second department, reversing a judgment entered on the verdict of a jury and granting a new trial.

The facts sufficiently appear in the opinion.

A. Anthony, for appellants. The only questions to be considered are those of law arising upon the exceptions. (Code, § 272; 34 N. Y., 370; 33 N. Y., 587.) A parol promise to indemnify for an act to be done is valid. (*Allaire* v. *Ouland*, 2 John. Ch., 52; *Messereau* v. *Lewis*, 25 Wend., 243.) The questions were properly determined by the court and jury. (*Hasbrook* v. *Paddock*, 1 Barb., 635; *Blossom* v. *Griffin*, 3 Ker., 569; *Phelps* v. *Bostwick*, 22 Barb., 314; *Spencer* v. *Babcock*, 22 Barb., 326; *Waldron* v. *Millard*, 3 Smith, 466.)

G. F. Comstock, for respondent. This court can review questions of law only. (*Dunham* v. *Watkins*, 12 N. Y., 556; *Griscom* v. *Mayor*, 12 N. Y., 586; *Oldfield* v. *N. Y. and H. R. R. R.*, 14 N. Y., 321; *Thurber* v. *Townsend*, 22 N. Y., 517; *Esterly* v. *Cole*, 3 N. Y., 502; *Borst* v. *Spelman*, 4 N. Y., 284; *Livingston* v. *Radcliffe*, 2 N. Y., 184; *Newton* v. *Bronson*, 13 N. Y., 687; *Johnson* v. *Whillock*, 13 N. Y., 344; *Davis* v. *Wynkoop*, 18 N. Y., 45; *Ex parte Bassett*, 2 Cow., 458.) An order granting a new trial cannot be reviewed, where the record shows it might have been granted on a question of fact. (*Hoyt* v. *Thompson, Ex'rs*, 19 N. Y., 208; *Griffin* v. *Marquadt*, 17 N. Y., 28; *Miller* v. *Schuyler*, 20 N. Y., 522; *Young* v. *Davis*, 30 N. Y., 134; *Vail* v. *Adams*, 5 N. Y., 161; *Dykers* v. *Allen*, 7 Hill, 49.)

RAPALLO, J. This action was brought to recover certain losses sustained by the plaintiffs, and against which they alleged that the defendant had, by an oral agreement, undertaken to indemnify them.

The defendant was the owner of a dock and storehouse situate on the Hudson river at Poughkeepsie, which had, prior to May, 1867, been used for the freighting business, but were at that time not in use. The complaint alleges that the disuse of the property for that purpose detracted largely from its value, and that the defendant, being desirous of re-establishing the freighting business from his said dock, on or about the 7th of May, 1867, agreed with the plaintiffs to

grant to them the use of the dock and storehouse for the freighting season of 1867, and that in consideration that they would carry on the freighting business from the dock, from that date onward to the close of navigation, and run a boat therefrom to the city of New York for the transportation of freight and passengers, the defendant would pay all loss or damage they should incur thereby; and that it was further agreed between the parties, that, in case the business should prove profitable, the plaintiffs should pay the defendant for the use of the dock and storehouse the sum of not more than $300.

The complaint then alleges that in pursuance of the agreement the plaintiffs chartered a steamboat, and from the 21st of May, 1867, to the close of the freighting season conducted the freight business from said dock, in the same manner as the freighting business was and had been for many years past conducted from similar docks, and by freighters on the Hudson river, and in so doing sustained a loss of upward of $7,500.

The defendant, by his answer, denied the agreement to indemnify, and also set up that the plaintiffs' losses were caused by their own negligence in conducting the business; and further, that they did not grow out of the legitimate freighting business, but out of operations not included in such business.

The issues were tried by jury at the circuit, and a verdict was rendered in favor of the plaintiffs for $6,000 damages.

It appeared upon the trial that a large part of the plaintiffs' losses were incurred in buying and selling live stock and grain, which dealings, they contended, were necessary for the purpose of bringing custom to the boat.

The questions litigated at the trial related in the main to the facts of the case. The plaintiffs claimed that the defendant had agreed to indemnify them against all losses which they might sustain in the business, including not only the transportation or freighting business proper, but also their dealings in live stock and grain; and in support of this claim they introduced testimony (not excepted to) to the effect that

the defendant agreed to indemnify them against loss in the freighting business, and that other parties, engaged in a similar kind of freighting business, were in the habit of trading in stock and grain, and that such dealings were incidental to and included in the freighting business as customarily conducted.

The plaintiffs and witnesses called by them also testified, that the defendant was cognizant of the dealings of the plaintiffs in stock and grain, and sanctioned them, and that in some instances he directed the purchases to be made.

All of these allegations were controverted by the defendant. He testified that he never agreed to indemnify the plaintiffs against losses in the freighting business. That all that he said upon the subject was that if the plaintiff, Winans, would live at Poughkeepsie, and go upon the boat, and attend to the money matters he would guarantee that the plaintiffs should lose nothing by the boat. That he never sanctioned their dealings in live stock and grain, but advised against them, and that they were not part of the freighting business, and in corroboration of his version an estimate in writing was referred to, as having been the basis of the arrangement between the parties, which estimate showed the expected receipts and disbursements of the transportation business, but contained no reference to any trading in live stock and grain.

Witnesses on the part of the defendant also testified, that the freighting business did not include the purchase and sale of live stock and grain.

The court at the trial submitted to the jury the controverted questions as to the guaranty, and the subjects which it was intended by the parties to embrace.

The jury must have found in favor of the plaintiffs' version of the contract, as the amount of their verdict exceeded the loss incurred in the business of the boat.

A motion for a new trial upon the evidence, and upon exceptions, was made to the judge at circuit and denied, and judgment was thereupon entered upon the verdict.

An appeal from that judgment, and also from the order denying a new trial, was taken to the General Term, and was heard upon a case containing the evidence, as well as the exceptions taken at the trial. The General Term reversed the judgment and granted a new trial.

The appeal to this court from the order granting a new trial, seems to have been brought upon the assumption that sections 268 and 272 of the Code, which provide that a judgment shall not be deemed to have been reversed on questions of fact, unless so stated in the order of reversal, apply to cases tried by jury. But it will be seen by reference to those sections, that they apply only to cases tried by the court or a referee, and we have lately held, in the case of *Wright* v. *Hunter* (ante page 409. Rep.), that in cases tried by jury, where a new trial is granted, at General Term, we will not entertain an appeal from the order granting a new trial, if it appears from the return that such order was or may have been made upon questions of fact.

Where there is a substantial conflict in the testimony, and a motion for a new trial, upon the evidence, has been made at Special Term, or to the judge at circuit, and denied, and an appeal from that order taken to the General Term, the question of the weight of evidence is properly before the General Term; and though there be also exceptions in the case, it is impossible to determine from the record that the new trial was granted upon the exceptions alone.

The appellant, therefore, in such a case fails to show that the General Term has committed an error of law in granting the new trial. If granted upon the evidence (the trial having been by jury), its decision is not reviewable in this court. 30 N. Y., 134; *Wright* v. *Hunter*, *supra*.)

The present case appears to have been before the General Term in proper shape for review upon the facts. There was a serious question, upon the evidence, whether the defendant's guaranty extended to the plaintiffs' operations in stock and grain, or was confined to the business of the boat, or the freighting business, and whether that business included the

dealings in question, and was so understood by the parties to the contract; and it may be that the court at General Term came to the conclusion that the weight of the evidence was in favor of the defendant upon that issue. If so, that was a sufficient ground for the order granting a new trial, without regard to the exceptions, or the disposition made of them.

It is not necessary, therefore, that we should examine the exceptions, except for the purpose of determining whether the appeal should be dismissed or the order affirmed, and the plaintiffs subjected to an absolute judgment against them. If any exception should be found to have been well taken, we should be justified in rendering an absolute judgment. (*East River Bank* v. *Kennedy*, 4 Keyes, 279.) But as the appellant's counsel claims to have been misled by the case of *Parker* v. *Jervis* (3 Keyes, 271), in which it is intimated that the General Term has no power in any case to review the finding of a jury, we are inclined to dismiss the appeal and leave the parties to a new trial, unless some point of law raised by the exceptions is necessarily fatal to the plaintiff's cause of action.

The only point we find which, if sustained, would have that effect, is that the agreement sued upon was void for want of consideration.

It is urged by the learned counsel for the respondent, that the business in question was to be conducted by the plaintiffs wholly for their own benefit, and that therefore, there was no consideration for an undertaking by the defendant to indemnify them against the losses which they might incur in that business.

But it must be borne in mind, that the plaintiffs were not embarked in the business when the guaranty was given. That the business was not free from risk, is shown by the result. According to the evidence of the plaintiffs, they were unwilling to incur the hazard of entering into the transaction without the defendant's guaranty, and so stated to the defendant, and the guaranty was the inducement to their engaging in the enterprise. By doing so, they not only devoted their

time and labor to the prosecution of the business, without compensation unless successful, but were obliged to incur the responsibility of chartering a steamboat and making the disbursements, and incurring the liabilities incident to the business. The incurring of these risks and liabilities by the plaintiffs was a sufficient consideration to support the defendant's promise. It is not necessary in such a case, that a benefit to the promisor should appear. It is sufficient that a liability is incurred by the promisee, and that the promise is the inducement to the transaction. (*Violett* v. *Patton*, 5 Cranch., 142, 150; *Chapin* v. *Lapham*, 20 Pick., 467.)

But, further, it is alleged in the complaint, and not denied in the answer, that the disuse of the defendant's property for freighting purposes detracted largely from its value, and there was some evidence in support of the allegation that the defendant was desirous of establishing the freighting business at his dock. The defendant was the sole judge of the adequacy of the consideration, and if, by giving the guaranty in question, he not only induced the plaintiff to incur liabilities, but also secured a real or fancied benefit to his own property, by causing it to be employed in the manner he desired, it cannot be said that there was no consideration for his promise.

Neither was the agreement void for want of mutuality. It is by no means clear that there was not such an undertaking on the part of the plaintiffs to carry on the business during the freighting season, as would have subjected them to an action for its breach, even while it remained executory. The amount of damages which could have been recovered for such breach cannot be material. But assuming that no obligation on the part of the plaintiffs was created at the time the defendant's promise was made, and that his promise or guaranty was merely on condition that the plaintiffs should perform the specified acts, yet the acceptance of the guaranty and full performance under it of the conditions, would render it obligatory upon the defendant. (*Kennaway* v. *Treleavan*, 5 Mees. & Welsb., 501; *Morton* v. *Burn*, 7 Ad. & El., 19, 22.)

For the reasons before stated, the appeal should be dismissed with costs.

All concur.

Appeal dismissed.

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EUROTAS MARVIN and FRANCIS J. CLARK, Appellants, *v.* LOUISA C. SMITH et al., Respondents.

E. W. S. being seized of certain premises, conveyed them to B., in trust, to receive the rents, issues and profits for the use and benefit of L. C. S., wife of the grantor, the same to be appropriated according to her directions, and upon her death, in case the husband survived, the same to be conveyed to her children or descendants, if any survive her, if none, then to him, and in further trust to sell or mortgage the premises conveyed, or any part thereof, whenever desired by the wife, "separate and apart from her husband," and pay over the proceeds to her or reinvest the same according to her directions. B. joined in the deed and accepted the trusts; the wife did not join. Subsequently husband and wife joined in a mortgage of the premises in the ordinary form to plaintiff, to secure a precedent debt of the husband. L. C. S. survived her husband. In an action brought to foreclose the mortgage,—*Held*, 1st. That the trust was valid and the deed vested the whole estate in the trustee, subject to the execution of the trust and to the wife's contingent right of dower, that the power of sale was irrevocable by the grantor, who had, at the time of the execution of the mortgage, no estate, legal or equitable, in the premises capable of being transferred. 2d. That the wife's inchoate right of dower, was incapable of being transferred or released by her during coverture, except to one who already had or who by the same instrument received an independent interest in the estate, nor could she bind herself personally by a covenant or contract affecting her dower right. She was not estopped, therefore, by any such covenant from setting up a subsequently acquired title, and the plaintiff took no interest under his mortgage.

(Submitted November 23d, 1871; decided December 5th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court of the fourth judicial department, affirming a judgment entered upon a decision of the court at Special Term, dismissing plaintiff's complaint.

This action is brought to foreclose a mortgage executed by

the defendants, Louisa C. Smith and Emory W. Smith, her husband, to the plaintiffs, and bearing date the 16th day of February, 1857. The mortgage was given to secure an indebtedness from said Emory W. Smith to the plaintiffs.

On the 10th day of January, 1851, the said Emory W. Smith, being the owner of the lands described in the mortgage, executed a trust deed of the same to one Philander Bennett, which deed contained the following trusts:

"In special trust and confidence, nevertheless, that the said party of the second part shall hold the above bargained premises, and every part and parcel thereof, as a trust estate, for the purposes following, to wit: That, during the life of Louisa C. Smith, wife of the said party of the first part, the rents, issues and profits of the said premises and lands hereby granted shall be, by said the party of the second part, received and appropriated for the sole use and benefit of the said Louisa C. Smith, according to such directions as she may give said party of the second part, separate and apart from her said husband; and that, after her death, in case the said party of the first part shall survive his said wife, said Louisa C. Smith, the remainder of the said estate hereby granted shall be conveyed by the heirs of the said Louisa C. Smith, on her begotten, absolutely to share and share alike; but in case no children or descendants of the said Louisa C. Smith shall survive her, that then the remainder of the estate hereby granted, after her death, shall be conveyed to the said party of the first part, if living.

"And in further trust, that, whenever the said Louisa C. Smith, separate and apart from her said husband, shall desire a sale or mortgage of the lands and premises hereby granted, or of any part or portion thereof, then the said party hereto of the second part shall sell or mortgage the same, or such part or portion thereof, according to such directions, and pay over to the said Louisa C. Smith, or reinvest the proceeds of such sale or mortgage, according to the direction given by the said Louisa C. Smith to the said party of the second part, separate and apart from her said husband."

Since the making of said deed and mortgage, the said Emory W. Smith and Philander Bennett have both died, and the defendant, Reuben C. Sage, has, by an order of the Supreme Court, been appointed trustee of the trusts mentioned in said deed, in place of said Bennett. The said Emory W. Smith left him surviving his wife, the defendant, Louisa C. Smith, and three sons, the defendants, Sylvester T. Smith, Albert G. Smith, and Charles Smith, children of Louisa C. The evidence tended to show, that the consideration of the conveyance to Bennett was realized by Emory W. Smith out of the separate property of his wife sold and conveyed about the same time. The court held that plaintiff was not entitled to maintain his action, and ordered judgment that complaint be dismissed, with costs.

B. H. Williams, for appellants. Any real estate not conveyed by E. W. Smith to Bennett was susceptible of being mortgaged. (*Stenecker* v. *Dickinson*, 9 Barb., 521; 2 Hand, 66; *Moore* v. *Little*, 17 N. Y., 210; *Mead* v. *Mitchell*.)

O. O. Cottle, for respondents. The deed created an express trust, and during its continuance vested the whole title in the trustee. (2 R. S., chap. 1, title 2, art. 12, §§ 55, 60.) The beneficiary could not assign or dispose of her interest. (2 R. S., chap. 1, title 2, art. 2, § 66.) Unless conditions were fulfilled, an attempted execution of the power was unauthorized. (1 R. S., 736, § 121; *Allen* v. *Dewitt*, 3 Com., 274; *Bloomer* v. *Waldron*, 3 Hill, 361, 371; Chance on Powers, 172, § 454; *Waldron* v. *McComb*, 1 Hill, 111; 36 N. Y., 581; *Hopkins* v. *Myall*, 2 R. & M., 84; 2 Sugden on Powers, chap. 10, § 1, part 13, p. 94.) A court of equity will not aid defective execution of power in favor of a volunteer. (1 Story Eq., § 126; 2 Sugden on Powers, chap. 10, § 1, part 4, p. 17; 4 Johns. Chan., 500.) Plaintiff not entitled to equitable relief as Mrs. Smith stands in relation of surety. (8 Paige, 323; 5 Hill, 160; 1 Story Eq., § 176; *Fielden* v. *Gahens*, 6 Blatch., 524; *U. S.* v. *Price*, 9 How. U. S., 83, 90, 92; 3 Wilson, 530; *Simpson* v. *Field*, 2 Ch. Cases, 22;

Waters v. *Riley*, 2 H. & G., 310; 2 Sugden on Powers, chap. 10, § 1, part 32; *Vale* v. *Dederer*, 18 N. Y., 276; *Kelso* v. *Taber*, 52 Barb., 125, 131.) Mrs. Smith's contingent right of dower did not pass by the mortgage. (4 Seld., 110, 113.) After execution of deed there was no reversionary interest in grantor. (1 Johns. C., 399; 3 Johns., 388; *Holmes* v. *Carley*, 31 N. Y., 289; Sugden on Powers, 153.) The clauses of deed operated as a grant by implication of the remainder after death of Mrs. Smith to the children. (Sugden on Powers, chap. 10, p. 167; *Witts* v. *Boddington*, 3 Bro. C. C., 95; 5 Ves. Jr., 503; *Cosserton* v. *Sutherland*, 9 Ves. Jr., 445.

ALLEN, J. It is claimed in the complaint that the dower interest of Mrs. Smith was affected by the mortgage. It could not be except as an incident to an estate or interest of the husband which was the subject of the mortgage.

The right of dower being at the time of the delivery of the mortgage inchoate, could not be conveyed or assigned either absolutely or by way of mortgage. An inchoate right of dower may be released to the grantee of the husband, by a proper conveyance executed and acknowledged in the form prescribed by statute, but the right cannot be transferred to a stranger, or to one to whom the wife does not stand in privity. (*Robinson* v. *Bates*, 3 Met., 40; *Tompkins* v. *Fonda*, 4 Paige, 448; *Jackson* v. *Vanderheyden*, 17 J. R., 167; 1 Washburn on Real Property, 252.)

The right of a widow to have dower assigned to her, is not such an estate as can be leased or mortgaged, and an instrument purporting to be a lease, when it appears on its face that the subject of it is only a right to have dower assigned, does not estop the lessee from denying the title of the lessor. (*Croade* v. *Ingraham*, 13 Pick., 33.) Neither can a feme covert bind herself personally by a covenant or contract affecting her right of dower during the coverture. Hence a deed executed by husband and wife with covenant of warranty, does not estop the wife in an action of eject-

ment against her after the death of her husband, from setting up a subsequently acquired title to the same lands. The general rule that a vendor of real estate in fee with covenants of warranty cannot acquire an outstanding title, and set it up adversely to his conveyance, is not applicable to the deed of a feme covert, who unites with her husband in a conveyance with warranty. (*Jackson* v. *Vanderheyden*, 17 J. R., 167.) The inchoate right of dower not being the subject of a conveyance in any of the usual forms by which real property is transferred, and the doctrine of estoppel by which subsequently acquired titles, are made to inure to the benefit of former grantees of lands with covenants of warranty being inapplicable, it follows that the grantee or mortgagee claiming under an instrument executed by a married woman during coverture, acquires no title to or interest in the dower of the grantor or mortgagor when the estate becomes absolute, whether dower has been assigned or not. The law will not effect indirectly, or by way of estoppel, that which cannot be accomplished by contract, and the ordinary forms of conveyance. If, therefore, the husband had no interest which was subject to the mortgage, and passed by means of it, the mortgagee took no title to the dower right. That could only be released by a deed of her husband, conveying the estate to which it was incident, in which she should unite. (*Carson* v. *Murray*, 3 Paige, 483–503; *Jackson* v. *Vanderheyden*, *supra*; *Page* v. *Page*, 6 Cush., 196.)

The husband had no estate or interest remaining in the mortgaged premises at the time of the delivery of the mortgage, which could be affected by that instrument, or to which the dower right of the wife was incident. He had by a deed of conveyance, delivered and on record several years before the execution of the mortgage, conveyed the lands in fee to one Philander Bennett, in trust, for the purposes named in the deed; and as Mrs. Smith did not join in that conveyance, the grantee took title subject to her contingent right of dower. There was a possibility of a future estate, but that possibility became extinct by his death before the happening

of the events upon which, in any contingency, he could become entitled to a reconveyance of or any beneficial interest in the lands. The trusts of the conveyance were, that during the life of Mrs. Smith, the wife, the rents, issues and profits were to be appropriated by the trustee for her sole benefit and use, according to her directions, separate and apart from her husband; and, after her death, in case the grantor should survive his wife, that the lands should be conveyed to the grantor.

Power was given to the wife, separate and apart from her husband, to direct a sale or mortgage of the premises by the trustee, and to receive the proceeds or direct a reinvestment thereof. It was only upon the contingency of the death of the wife, leaving no children her surviving, and without having exercised the power of sale conferred, that any estate could have reverted to the grantor. The husband and grantor died in the lifetime of the wife, and of several children, the fruit of the marriage, and the estate, or right to a reconveyance, never vested, and has now become impossible. The trust to receive and appropriate the rents and profits to the use of Mrs. Smith during her life is a valid trust. It is among the express trusts permitted by statute. (1 R. S., 728, § 55.) The trust being valid, the statute vests the whole estate in the trustee, in law and equity, subject only to the execution of the trust, except as otherwise provided. (Id., 729, § 60.) There is no part of the estate not embraced in the trust, or otherwise disposed of, so as to bring it within the provisions of the sixty-second section, which declares that every estate and interest not embraced in the trust, and not otherwise disposed of, shall remain in or revert to the person creating the trust. The same statute (§ 61) gives to the person creating a trust, the right to declare to whom the lands to which the trust relates shall belong, on the event of the failure or termination of the trust, and permits a grant or devise of the lands subject to the trust. By the deed creating the trust and conveying the lands, the grantee has created a valid power, in trust, to sell or mortgage the lands, and has placed the disposal of the proceeds with the principal beneficiary

under the deed. But for this power of sale, it need not be denied, that the creator of the trust could have granted or devised the lands subject only to the execution of the trust.

The trust still continues and the power of sale is valid, and may be executed at any time upon the request of Mrs. Smith; and when executed, the purchaser from the trustee will acquire a perfect title. (*Belmont* v. *O'Brien*, 2 Kern., 394.)

The power was irrevocable by the grantor. No power of revocation is reserved in the deed. (1 R. S., 735, § 108.)

So long as this power of sale is in force, and the grantor cannot revoke it, and by his death the possibility of a revocation is gone, the trustee alone can grant or convey the premises. The grantor of the power has no estate, legal or equitable, which is capable of being transferred. If the wife shall die without having carried into effect the power of sale, a question may arise as to who will be entitled to the estate. But it would seem it would go, in the first instance, to the children of the marriage, as within the objects of the deed. But without considering this question it is sufficient, that at the time of the mortgage there was no interest or estate in the husband, which could be conveyed or transferred by him or by his act. There was no estate or interest, which would have been the subject of a lien under a judgment, or which could have been sold on execution against him. (*Briggs* v. *Davis*, 21 N. Y., 574.) There was clearly no attempt by Mrs. Smith, or intent to execute the power of sale or mortgage vested in her; and there is no defect, therefore, in the execution of the power which, in any case, a court of equity could remedy.

The opinion of Judge TALCOTT at Special Term is well reasoned, and conclusive upon every point made in behalf of the appellant. The judgment should be affirmed.

All concur.

Judgment affirmed.

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110 182

WILLIAM REDMOND, Appellant, v. THE LIVERPOOL, NEW YORK AND PHILADELPHIA STEAMBOAT COMPANY, Respondent.

A common carrier by water is not discharged from all responsibility for the safety of the goods intrusted to him, by a discharge from the vessel at a proper place, reasonable hour, and upon due notice; the wharf or place of discharge, not having been selected by the owner or consignee for storing the goods.

As a general rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit; or, in case of imported goods, subject to duty, to see that they are in proper custody.

A consignee is entitled to reasonable time to remove the goods; and until such reasonable time has elapsed, they are at the risk of the carrier, who has no right to put them in store for the consignee.

The contract of the carrier is necessarily subject to the revenue laws, and his obligation does not require a delivery in contravention thereof. If the owner fails to comply with the laws, or after reasonable opportunity is given, omits to obtain the necessary authority to remove or receive the goods, and they are, in pursuance of law, delivered to and received by the proper officers, the carrier is discharged from further responsibility. But where the owner has obtained the requisite permit, the fact that the removal is under the supervision of an inspector of customs, does not affect the relation of the parties. The owner is entitled to an absolute delivery from the master of the vessel.

(Argued November 24th, 1871; decided December 5th, 1871.)

APPEAL from order of the General Term of the Supreme Court of the first judicial district, reversing a judgment entered in favor of plaintiff, and ordering a new trial.

The action is brought to recover the value of a box of merchandise, one of twenty-three boxes shipped on board defendant's steamer at Belfast, Ireland, to be transported to the city of New York.

The Edinburgh, one of the defendant's steamers, with a large miscellaneous cargo for different consignees, including the twenty-three cases for the plaintiff, arrived at the port of New York on the first of March, 1866. She commenced discharging on the sixth of March, at ten A. M., and continued doing so until six P. M. Resumed on the seventh at seven

A. M., and continued until six P. M. On the eighth began at seven A. M., and kept on until two A. M. the next day. On the ninth, from seven A. M. until three and a-half P. M. when, her inward cargo being all discharged, she commenced taking in her return cargo. She sailed again for Liverpool on the tenth.

The invoices for the respective consignees were not discharged separately and distinctly, but the goods came out promiscuously and irregularly as they were reached.

These cases were landed on a wharf or pier, No. 44, North river, leased by the defendant, and used by it exclusively. After being landed they were checked by Mr. Mills, acting in behalf of the ship, and also by a custom house officer in attendance, whose duty it was to direct where the goods should be sent, in accordance with the entry previously made, and the permit granted thereon.

The cases, including the missing one, had been entered for warehousing, and the bonded warehouse No. 286 Water street had been designated as the warehouse to which they should be sent.

The defendant had a delivery clerk, whose duty it was to superintend the delivery of all goods to the carman who carried them away from the pier. He occupied a little office outside of the gate, near the wharf. It was his general, if not uniform practice, to take receipts from the master carmen for the goods carted by them and their men as they left the pier.

He was furnished by the defendant with printed blank receipts, which he filled in with the marks and numbers of the packages put on the carts, and to these he took the signatures of the master carmen and filed them away. Such a receipt, dated March eighth and ninth, for twenty-two of the twenty-three packages he produced on the trial.

For the twenty-third case, No. 1,609, the case in dispute, he had no receipt.

At the close of the testimony the referee was requested by the defendant's counsel to find as follows:

1. That the case of merchandise in the complaint men-

tioned was discharged at a proper and reason
place, at the city of New York, on due notice,
discharge was a full delivery according to law
of the port of New York, as proved, and di
defendant from all responsibility therefor, whic
declined to find, and defendant's counsel except

2. That the said case of merchandise being
chandise, received at this port, entered in bond
tiff, was delivered on the wharf into the hands
States authorities, or placed under their custod
and that such disposition of such case was a suffi
and discharge of this defendant of its obliga
contract of carriage, which the referee declined
defendant's counsel excepted.

3. That under the evidence presented, and the
ble to this case, the defendant was entitled to
judgment in its favor, which the referee decli
and defendant's counsel excepted.

The referee found in his report, as matter of f
defendant had failed to deliver to the plaintiff
merchandise in question, and that it was of t
$971.88, and he found as a conclusion of law, th
tiff was entitled to judgment for the said sum, w

To both of these findings defendant excepted.

Judgment was duly entered upon said report.

H. Nicoll, for appellant. The order not stati
reversal was on questions of fact, only questions o
examined. (Code, § 248; *Baldwin* v. *Van Duse*
487; *Shibley* v. *Angle*, 37 N. Y., 626.) To reli
from responsibility, notice must be given and a
time for removal. (*Richardson* v. *Goddard*, 23
25; see also *Ostrander* v. *Brown*, 15 John., 39
Culver, 17 Wend., 305; *Fiske* v. *Newton*, 1 Den.,
v. *Bourne*, 4 Bing. N. C., 321; *Same* v. *Same*, in E
3 Man. & Grang., 643; *Same* v. *Same*, House o

Clark & Fin., 45; *Norway Plains Co.* v. *Boston and Maine R. R.*, 1 Grey, 263.)

J. W. Gerard, for respondent. Upon the deposit of goods at the usual wharf or other proper place, and upon reasonable notice of the arriving and unlading, a carrier by water is discharged from responsibility. (*The ship Grafton*, Admiralty R., 43; *Fields* v. *Peacock*, Manuscript Decisions; *Kennedy* v. *Dodge*, 1 Bard. D. C., 311; *Cope* v. *Cordova*, 1 Rawle. Penn. R., 203; Edwards on Bailments, 532–534; Story on Bailments, §§ 544, 545; *Richardson* v. *Goddard*, 23 How. U. S., 28; Angell on Carriers, §§ 310, 311; *Northern* v. *Williams*, 6 La., 578; *The Norway* (reported 12 Law Times, N. S.), 57; *Ely* v. *New Haven Steamboat Co.*, 53 Barb., 207.) The goods were delivered to the custom-house receivers, and they and not defendant were bound to account for them. (Laws of U. S., of Aug. 6, 1846, vol. 9; U. S. Stat. at Large, 53; Law of March 28, 1854, vol. 10, p. 270; *Harris* v. *Devine*, 3 Peters, 292.)

ALLEN, J. The Supreme Court has reversed the judgment entered upon the report of the referee and ordered a new trial. As it is not stated in the judgment of reversal, that it was on questions of fact, the judgment must be deemed to have been reversed on questions of law, and the facts are not open to review in this court. (Code, §§ 268, 272; *Baldwin* v. *Van Deuzen*, 37 N. Y., 487.) The referee has found that the defendants, as common carriers by water, received the plaintiff's merchandise at Belfast, Ireland, to be carried from there to New York, and there delivered to the owner, the bill of lading exempting the carriers from certain risks, by none of which were the goods lost; that the vessel in which the goods were shipped arrived at her port of destination having the goods on board, and that twenty-two of the twenty-three cases were delivered to the plaintiff, and that the defendants failed to deliver the remaining case or box.

Upon these facts, if there was nothing to detract from their force, or excuse the defendants, the plaintiff was entitled to judgment for the value of the missing case.

It was not claimed in the answer, and the referee was not requested to find upon the evidence, that there was an actual delivery to the plaintiff or his agent, but it was claimed that the duty of the carrier was fully performed, so as to discharge the company from liability as such carrier, without such actual delivery to and receipt by the owner and consignee; and the questions for consideration here are presented by three requests to the referee, and his refusal to find and decide as requested. The third of the propositions is very general, and presents no specific question of fact or of law. It is, that under the evidence presented and the law applicable to this case, the defendant was entitled to a report and judgment in its favor. A request, in this form, is equivalent to and presents no other question, than is presented by the exception to the general conclusions of law of the referee adverse to the defendant; and as that is fully warranted by the findings of fact, and they are, in turn, supported by the evidence, and not controverted by the defendant, the request and exception to the refusal need not be farther noticed. The counsel should have specified some fact or facts to be found, or rules of law to be adjudged; that is, called the attention of the referee to the facts claimed to have been proved, or the particular legal principle intended to be presented for decision to entitle the defendant to any benefit from it's request. To give effect to a request so general, would establish a rule to operate as a trap and a snare to suitors, as well as to courts and referees. The first request was, that the referee should find that the case of merchandise, in the complaint mentioned, was discharged at a proper and reasonable time and place, at the city of New York, on due notice; and that such discharge was a full delivery according to law, and the usage of the port of New York as proven, and discharged the defendant of all responsibility therefor. This request, in the form in which it was made was properly denied, even if it be con-

ceded that the facts alleged were incontrovertibly proved. A discharge from the vessel at a proper place, seasonable hour, and upon due notice to the consignee, does not discharge the carrier from all responsibility for the safety of the goods. It may, under some circumstances be regarded as a delivery to the consignee, and a performance of the contract of affreightment, so as to discharge the ship owner from the stringent liability of a carrier, but such cases are exceptional, and as a rule, if for any reason the consignee does not appear to claim the goods, or does not receive them, it is the duty of the carrier to provide a proper place of deposit, or in case of imported goods, subject to duty, to see that they are in proper custody. The general rule is, and to it there are no recognized exceptions, if the consignee is unable or refuses to receive the goods, the carrier is not at liberty to leave them on the wharf, but it is his duty to take care of them for the owner. (Story on Bailments, § 545; *Ostrander* v. *Brown*, 15 J. R., 39; *Mayell* v. *Potter*, 2 J. Cas., 371; *Fisk* v. *Newton*, 1 Den., 45.) Judge GRIER, in *Richardson* v. *Goddard* (23 How. U. S. R., 28), which was an action for the non-delivery of cotton at Boston, shipped at Appalachicola, used this language: "When goods are not accepted by the consignee the carrier should put them in a place of safety; and when he has so done, he is no longer liable on his contract of affreightment." It follows that until this is done the liability of the carrier continues. (And see 2 Kent's Comm., 605.) If it be conceded that a carrier by water may discharge himself from liability, by delivering merchandise upon a wharf, with notice to the consignee, the latter is entitled to a reasonable time to remove them, and they are at the risk of the carrier until a reasonable time for such removal has elapsed; and a right to put the goods in store for the consignee does not exist until the latter has had a reasonable time for their removal. (*Price* v. *Powell*, 3 Com. R., 322.) It was doubted in the case cited, whether a local custom might be shown in exoneration of the carrier, by which the delivery was complete, by landing merchandise on the wharf.

The request to rule that the carrier was exonerated from liability by depositing the goods on the wharf, and before the consignee had time to receive them, was properly refused. A mere deposit of the goods by the defendants on their own wharf, without acceptance by the consignee, not separated and set apart from the residue of the cargo, and without a reasonable opportunity, and time for their removal, did not discharge the defendant, and they remained at the risk of the carrier, under all the circumstances suggested in the request as having been proved and established on the trial. Other circumstances not claimed to have been proved were necessary to relieve the defendant from liability as carriers. *Cope* v. *Cordova* (1 Rawle., 203), decided in 1829, is relied upon as sustaining the position of the defendant, and the syllabus of the case, as prepared by the reporter, goes the full length of the doctrine contended for. It is as follows: The master of a vessel arriving at the port of Philadelphia from a foreign port, is not bound by the bill of lading, to deliver the goods personally to the consignee. The liability of the ship-owner ceases when the goods are landed at the usual wharf. The first proposition, that a personal delivery to the consignee is not required, is correct. The other part of the statement, is not warranted by the judgment of the court, and should be essentially qualified and modified. The action came before the court upon a writ of error, upon a case stated. A ship arrived at Philadelphia from Liverpool with ten crates of iron for the plaintiff, all of which but one, were received by the plaintiff. The ten crates were entered by the plaintiff at the custom-house, and the plaintiff sent a porter with a custom-house permit and authority to receive the goods. The porter delivered the permit to the inspector on board the ship and asked for the goods. On three different days one or more of the crates were received by the plaintiff. The porter did not attend at the wharf the whole of the days, but called repeatedly during the days and inquired of the inspector for the crates, and took them away as received. The last

crate was landed on the wharf on one of these days, but was not received by the porter. The usual custom and practice followed, in unloading vessels at that port, was stated. In giving judgment, the court referred to the customs at certain foreign ports, as stated by authorities, and the custom at Philadelphia, and that inquiry had been made among merchants, and that the result of the inquiry was, that theretofore goods when landed had been considered at the risk of the consignee, and that the general understanding had been, that the liability of the ship-owner ceased upon the landing of the goods at the usual wharf; but the decision is finally made to rest upon the proposition that if, under the circumstances stated, the goods were lost, it was in consequence of the plaintiff's own negligence, or that of his servant. The case was decided upon its peculiar circumstances, and upon the ground of the neglect of the plaintiff, and is not an authority for any general principle.

Richardson v. *Goddard* (*supra*), is authority for the rule, that when the master of a vessel delivered the goods at the place chosen by the consignees, at which they agreed to receive them, and did receive a large portion of them, after full and fair notice, and the master deposited them for the consignees in proper order and condition at midday, on a week-day, in good condition, it was a good delivery, according to the general usages of the commercial and maritime law. The rule is carefully guarded, and comes far short of the request made by the defendant. The facts, as stated, were held to constitute a good delivery to the consignees. The goods were not delivered at the wharf of the carriers, or at a wharf at which they intended to discharge the cargo, but at another wharf selected by the consignees, and for their convenience. The cotton had been placed on the wharf at the disposal of the consignees, and with their knowledge, and they had removed a part of it, and postponed the removal of the residue, for reasons which the court held insufficient, for more than twenty-four hours after the unloading was completed, when the cotton was destroyed by an accidental fire.

The consignees had hindered the discharge of the cargo, by their prior neglects to remove that which had been placed on the wharf, and received repeated notices from the master to remove the cotton.

This case does not come within the principle of that decision. Here the goods were on the defendant's wharf, not separated and set apart for the consignees, there was no neglect in their removal, and they were not casually destroyed.

Ely v. *N. Haven Steamboat Co.* (53 Barb., 207), was decided on its own peculiar circumstances, as was *Cope* v. *Cordova* (*supra*). The delivery upon the wharf in that case, and in reference to the course of business between the parties, was held to be a delivery to the consignee, exonerating the carrier. The court says: "The evidence clearly establishes a course of business between the parties, in relation to the mode of delivering goods, which must govern the liability of the defendants in this case." *Gotliff* v. *Brown* (4 Bing. N. C., 314; S. C., in Exch. Ch., 3 M. & G., 643; and in the House of Lords, 11 Clark & Fin., 45), although not precisely analogous to this case, as there the goods were destroyed by a casual fire, and here they have been misdelivered or wrongfully taken, is, nevertheless, an authority directly hostile to the claim of the defendant, and sustains the refusal of the referee to decide, as requested, that a discharge upon the wharf exonerated the carrier. To a declaration on a contract for the carriage of goods from Dublin to London, and a delivery at the port of London to the plaintiff or his assigns, a plea that, on the arrival of the vessel at London, the goods were deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, that before a reasonable time for delivery elapsed, they were destroyed by fire, which broke out by accident, was held bad.

There was no sufficient evidence of a custom or usage in New York which, under such circumstances, would release the carrier from further liability, and place the goods at the

risk of the owner. It is not necessary to consider whether such a custom, if proved, could vary the contract of the parties.

The other request was, that the referee should find and decide that the merchandise, being foreign merchandise, entered in bond by the plaintiff, was delivered on the wharf into the hands of the United States authorities, or placed under their custody or control, and that such disposition was a sufficient delivery and discharge of the defendant from the obligations of the contract of carriage.

The control which the law gives the revenue officers over foreign merchandise, brought into the ports of the United States, has nothing to do with the contract between the shipowner and the consignee or owner of the goods.

The promise of the carrier is, necessarily, subject to the revenue laws of the country, and his obligation does not require a delivery in contravention of the laws, but when and as those laws permit, and to the party entitled. It may well be that, if the owner fails to comply with the laws, and cannot lawfully land or remove the goods, and they are seized and taken by the officers of the government, or if, upon the omission of the owner, after a reasonable opportunity is given him for that purpose, to obtain the necessary authority to remove or receive the goods, they are, in pursuance of law, delivered to and received by the proper officers, in other words, placed in the custody of the law, the carrier would be discharged from further responsibility to the merchant. It would be equivalent to a storing of the goods, under circumstances authorizing the master of the vessel to store them for the owner. But such is not this case. The owner did obtain a permit to land the goods, to receive them from the carrier, and remove them to a particular place of deposit, a designated bonded warehouse. That the removal was under the supervision of an inspector of customs, whose duty it was to see that goods were not removed in fraud or evasion of the revenue laws, or taken to places not authorized by law, did not at all affect the relation of the parties to the action, or their

duties and liabilities. Such of the goods as were taken were received and taken by the plaintiff, and, under the permit, he was entitled to take all. He was entitled to an absolute delivery from the master of the vessel; but the fact that his possession, as between him and the United States, was a qualified possession, did not affect the transaction with the defendant.

There is no evidence in the case, tending to show that the custom-house officers had, or had authority to take, the possession or control of the goods, or prevent the delivery to the plaintiff to be taken by him to the warehouse. It would have been no answer to a demand by the plaintiff of the goods, that the duties were not paid, that they were entered in bond, and that an inspector of customs was present to watch their landing, and see that they were carried away by proper persons, and to a proper place of deposit. The inspector did not assume to, and had no legal right to interfere with the delivery of the merchandise to the plaintiff under his permit. He might direct the mode of delivery so far as essential to prevent frauds upon the revenues, but this was the extent and limit of his duties and powers.

The delivery of the goods by the ship-owners or their agents was regarded as a transaction with the plaintiff, and not with the United States officers, except as they might prevent a delivery as authorized by law.

The case was well decided by the referee, and the order granting a new trial must be reversed, and the judgment on the report of the referee be affirmed.

All concur.

Judgment accordingly.

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JOHN B. SCHENCK and HENRY B. SCHENCK, Respondents, v. JOHN ANDREWS, Appellant.

The provisions of section 2 of act of 1853 (chapter 333 of the Laws of 1853), amending the act of 1848 (chapter 40 of the Laws of 1848), authorizing the formation of corporations for manufacturing and other purposes, does not authorize the issue of stock, in addition to the capital stock stated in the certificate of organization, and any increase thereof made pursuant to the act of 1848. It simply authorizes the payment for such stock, in property necessary for the business of the company instead of in cash; and under its provisions the whole capital stock can be paid for in property, and when so paid for, the owner thereof is not liable to the creditors of the company under section 10 of the act of 1848.

(Argued November 27th, 1871; decided December 5th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district, affirming a judgment of the city court of Brooklyn, sustaining demurrer to defendant's answer.

The complaint alleges an indebtedness to plaintiff from the Empire Planing and Molding Mill Company, a corporation organized under the act to authorize the formation of corporations for manufacturing, mining, mechanical, or chemical purposes, passed February 17th, 1848, and the several acts amendatory thereof, and the recovery by plaintiffs of a judgment for such indebtedness against said corporation.

It then alleges, and the plaintiffs seek to make defendant liable as a stockholder, on the ground that the capital stock was never paid in, and that there was no certificate filed of such payment.

The answer shows that a certificate of incorporation was filed. That "after the formation of said corporation, the trustees thereof purchased a manufactory in the city of Brooklyn, and other property necessary for their business for $100,000, the value thereof (and the full amount of the capital), and did issue the whole of said capital stock to the vendor thereof for such manufactory and property," etc., etc., "which

stock, so issued, was declared by said company, and was taken by said vendor as full paid stock," and that a certificate, in accordance with the fact, was filed.

A copy of the resolution of the trustees is annexed; also a copy of the certificate filed in accordance with the facts.

The answer was demurred to, on the ground that the same does not state facts sufficient to constitute a defence. The demurrer was over-ruled, and judgment given for plaintiffs on such demurrer for $\$1{,}098\frac{25}{100}$, from which defendant appeals.

The only grounds on which the plaintiffs seek to fix the liability of defendant, for the amount of the judgment recovered against the company is, that the stock was not paid in, and that no certificate of such payment was filed. (Act of 1848, § 10; 2 R. S., 5th ed., p. 660, § 32.) That statute required the stock to be paid in cash.

By the act "to amend an act to authorize the formation," etc., etc., passed June 7th, 1853, it is provided:

Section 2. That "the trustees of such companies may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor. And the stock, so issued, shall be taken as full stock, neither shall the holders thereof be liable for any further payments under the tenth section of said act. But in all statements and reports of said company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact." (2 R. S., 5th ed., 660, § 33.)

A. J. Parker, for appellant. The answer sets up a literal compliance with the act of 1853, and is a complete defence. (2 R. S., 5th ed., 660, § 33.) The answer does not set up a counter-claim or new matter, and is not demurrable. (*Land* v. *Seaman's Bank*, 37 Barb., 129; *Rice* v. *O'Connor*, 10 Abb., 362; *Ketchum* v. *Zerega*, 1 E. D. Smith, 553; *Smith* v. *Grumin*, 2 Sandf., 702; *Davy* v. *Betts*, 23 How., 396; *Stodard* v. *Onondaga Conference*, 12 Barb., 573.)

H. C. Place, for respondents.

GROVER, J. After the recovery of a judgment against the corporation for the price of merchandise sold to it, and the return of an execution issued thereon unsatisfied, the plaintiffs seek, in the present action, to recover of the defendant, a stockholder in the corporation, the amount of their debt against it. To the complaint the defendant has interposed an answer as a defence, to which the plaintiffs have demurred, upon the ground that the facts stated therein do not constitute any defence to the action. This raises the question whether, assuming the truth of the facts stated in the answer, they constitute a defence. The answer states, in substance, that the defendant was and is the owner, by transfer to him, of upward of $30,000 of stock of the corporation, which is parcel of $100,000 of stock issued by the trustees to Elias T. Hatch, in payment for a manufactory in the city of Brooklyn, and other property necessary for the business of the corporation, purchased of him, which stock so issued was declared by the company, and was taken by the vendor, as full paid stock. That the said $100,000 so issued was the entire stock of the company. That the property so purchased was of the fair value of $100,000. The answer further states that the requisite certificate of the purchase, and payment thereon of the stock, was, before the purchase of the merchandise of the plaintiffs, filed, etc., in the clerk's office of the county where the business of the company was carried on. The counsel for the plaintiffs insists that, notwithstanding these facts, he is still entitled to judgment against the defendant for his debt, by virtue of the provisions of sections 10 and 14 of the act of 1848 (Laws of that year, 56, 57), under which act the company was incorporated. Section 10 provides, that all the stockholders, of every company incorporated under the act, shall be, severally individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of the stock held by them, respectively, for all debts and contracts made by the company, until the whole amount of stock, fixed and limited by the company, shall have been paid in, and a certificate thereof shall be

made and recorded as required by the act. Section 14 provides, that nothing but money shall be considered as payment of any part of the capital stock. Had there been no subsequent legislation upon the subject, the right of recovery by the plaintiff would have been clear, but in 1853 the Legislature passed an act (Laws of that year, 705), amending the act of 1848. Section two of the latter act provides, that the trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor, and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls, neither shall the holders thereof be liable for any further payments, under the provisions of the tenth section of the said act, but in all statements and reports of the company, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact. It is entirely clear, that this section designed to exonerate the holders of stock thereby authorized, from the liability to the creditors of the company imposed by section 10 of the act of 1848. But it is insisted by the counsel for the plaintiffs, that section 2 of the act of 1853, has no application to the stock fixed and limited by the articles of association. That that stock is the capital stock of the company, and can only be paid in cash, as provided by section 14 of the act of 1848. That the effect of section 2 of the act of 1853, is only to authorize the issue of new stock in addition to that specified in the articles, which new stock may be issued in payment of necessary property purchased by the company, and that as it appears from the answer, that the stock owned by the defendant was not new and additional stock, but parcel of that specified in the articles, he is liable to the creditors of the company under section 10 of the act of 1848. But section 2 will not admit of such a construction. By it power is conferred upon the trustees, to issue the stock of the company in payment for necessary property purchased. Section 1 of the act of 1848,

requires, that the certificate to be signed by the associates shall, among other things, state the amount of the capital stock of the company. Section 20, and subsequent sections of the act provide for a subsequent increase of this amount of capital stock. The amount stated in the certificate, and the increase thereof, as provided in the sections last referred to, is all the stock the company has the power to issue. All of this is declared to be capital stock. The act of 1853 does not authorize the issue of any stock in addition to the capital stock stated in the certificate, and any increase thereof made pursuant to the provisions of the act of 1848, but simply authorizes, paying for this stock in property necessary for the business of the company, at its fair value, instead of cash as required by section 14 of the act of 1848. When so paid for in either mode, the owner is not liable to the creditors of the company, under section 10 of the latter act, until paid for in one or the other mode, the owner is liable under section 10, to the creditors of the company. Whether the property purchased was necessary to the business of the company, and whether the price paid therefor was no more than its fair value, are questions of fact, to be determined like other similar questions if controverted. The certificate of these facts filed, etc., pursuant to the act, are not made conclusive evidence of the facts in question. In the present case, the demurrer admits them to be true, and if true, the defendant is not liable to the creditors of the company under section 10 of the act of 1848. The General Term erred in affirming the judgment of the City Court of Brooklyn, sustaining the demurrer to the answer, and the judgment of both must be reversed, and judgment given for the defendant thereon, with leave to the plaintiffs to withdraw the same upon payment of the costs of the defendant in this and the courts below.

All concur.

Judgment accordingly.

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IRA EMERSON et al., by Guardian, Respondents, *v.* RAMIRO E. SPICER, Appellant.

A guardian in socage may lease the lands of his ward for a term as long as he continues guardian, or for any number of years within the minority of the ward. The lease, however, is subject to its being defeated by the appointment of another guardian, pursuant to the statute, and his election to avoid it.

(Submitted November 27th, 1871; decided December 5th, 1871.)

APPEAL from a judgment of the General Term of the Supreme Court in the fifth judicial district, affirming a judgment entered upon the decision of the court in favor of plaintiff.

The action is ejectment, brought to recover possession of certain premises, situate in the town of Ellisburgh, in the county of Jefferson.

James Emerson died intestate on the 14th day of September, 1864, leaving the plaintiffs, Ira Emerson, Clara Emerson, Carrie Emerson and Katie B. Emerson, his only children and heirs-at-law. At the time of his death he was the owner in fee of the premises in question. The said children were all infants at the time this action was commenced. George Clark was duly appointed the general guardian of said infant plaintiffs, on the 12th day of March, 1868, and on the 21st day of March, 1868, the plaintiffs demanded possession of the said premises. This action was commenced on the 25th day of April, 1868. Esther B. Emerson is the mother of the infant plaintiffs, and the widow of the said James Emerson, and she and the defendant executed a lease in writing of the premises in question, on the 31st day of January, 1866, for three years from the 1st of April then next, under which the defendant entered thereon, and in virtue of which he claimed the right to retain the possession thereof, at the time this action was commenced.

The court decided that defendant was unlawfully in possession, and ordered judgment that plaintiffs have immediate possession.

Moore & McCartin, for appellants. Esther B. Emerson, as guardian in socage, had authority to make lease. (McPherson on Infancy, 25, 35; Tyler on Infancy, 120.) The lease was only voidable at the will of the general guardian. (*Beach* v. *Nixon*, 5 Seld., 35.) Some act is required to be done by the general guardian sufficient in law to terminate lease. (*Bowman* v. *Foote*, 1 Law Reg. U. S., 352.) The lease should be adjudged valid, until adjudged invalid by a court of competent jurisdiction. (*Field* v. *Schieffelin*, 7 Johns. Ch. R., 150, 154; *Shopland* v. *Ryler*, 3 Crokis' James, 98; *The King* v. *The Inhabitants of Oakley*, 10 East, 494.) A stranger dealing with the guardian without fraud or collusion is not responsible to the ward. (*Byrne* v. *Van Hoesen*, 5 Johnson R., 66; *Field* v. *Schieffelin*, 7 J. C. R., 154; *Roe* v. *Hodgson*, 2 Wils., 129, 135; 2 Kent's Com., 247, note *b*.)

M. A. Hackley, for respondent. Guardianship in socage abolished by our statutes. (3 R. S., 5th ed., p. 2, §§ 5, 6, 7; Littleton B., 2, §§ 123, 124; *Byrne* v. *Van Hoesen*, 5 John., 66.) A guardian under the statutes cannot make a lease to continue beyond the duration of his own estate; when that ceases all leases fall with it. (2 Kent's Com., 9th ed., 246 and 247; Willard's Real Estate, 432; 1 Hilliard's Real Property, 204, §§ 44c, 45; 4 Kent's Com., 9th ed., 119, § 8; 21 Maine, 114.) Upon the appointments of general guardian, the right of the mother ceased, and all leases made by her terminated. (3 R. S., 5th ed., p. 2, §§ 5, 6, 7; 2 Kent's Com., 228, 247, and note *c.*; *Roe* v. *Hodgson*, 2 Wil., 129, 135; *Snook* v. *Sutton*, 5 Halsted, N. J., 133; *Beecher* v. *Crouse*, 19 Wend., 306; *Holmes* v. *Seeley*, 17 Wend., 75; *Sylvester* v. *Ralston*, 31 Barb., 286; *Ross* v. *Gill*, 4 Call., Va., 250; *Truss* v. *Old*, 6 Rand., Va., 556.)

PECKHAM, J. Only one question in this case. Had the mother of the plaintiffs, as guardian in socage, a right to lease the premises in question for three years, so as to convey an absolute right for that time? If she had, this action will not

lie. One of the plaintiffs was under fourteen years of age when this suit was instituted. Guardianship in socage at common-law continued until the ward was fourteen years of age and then ended; but it would seem that if no other guardian was appointed, it continued from then until another should be appointed, or until the ward arrived at twenty-one. The age of tenant in socage has, for many centuries, been fixed at fourteen. (Tyler on Infancy and Cov., 241; McPherson on Infants, p. on margin, 19, 41; *Byrne* v. *V. Hoesen*, 5 J. R., 66.)

At common-law he only could be guardian in socage, to whom the ward's lands could not by possibility descend.

Guardianship in socage here is entirely regulated by statute, both as to the persons who may be appointed and as to the time of its duration. (1 R. S., 718, § 5.)

Such guardianship shall belong: 1. To the father of the infant; 2. If no father, to the mother; 3. To others specified.

"To every such guardian, all statutory provisions, that are or shall be in force, relative to guardians in socage, shall be deemed to apply."

"The rights and authority of every such guardian, shall be superseded in all cases where a testamentary, or other guardian, shall have been appointed under the provisions" of the statute. (§ 7.)

The duties of such guardian are defined by statute. He must "keep up and sustain the houses, gardens, and other appurtenances to the lands of his ward, by and with the issues and profits thereof, or with other moneys of his ward in his hands, and shall deliver the same to his ward, when he comes to his full age, in as good order and condition, at least, as he received it, inevitable decay and injury only excepted." (2 R. S., 153, § 20.)

By the statute (12 Car., 2, ch. 24, §§ 8 and 9) a father might dispose of the custody of his children, and the profits of his lands, to a guardian by deed or will, as against any guardian in socage.

The general rule, as declared by courts and commentators, is, that a guardian in socage may take the land "during the guardianship." (*Field* v. *Schieffelin*, 7 Johns. Ch., 150.) The chancellor says: "The guardian in socage may lease it and dispose of it during guardianship." So Lord ELLENBOROUGH: "He may dispose of it during his guardianship." (*King* v. *Inhab. of Oakley*, 10 East, 491.) "By the common-law, neither the guardian in socage nor any other had power * * * to lease the freehold estate of the ward for any longer time than during the probable continuance of the trust, that is, in the case of guardianship by socage, until the age of fourteen." (Chancellor WALWORTH, in *Putnam* v. *Ritchie*, 6 Paige, 390–at 399.) Littleton says: "When the heir cometh to the age of fourteen complete, he may enter and oust the guardian in socage," and make him account. (Litt., § 123; Co. Litt., 88 *a*.) Comyn says he may lease of the infant's estate till his age of fourteen years. (Comyn, title Guardian, B, 4.) To the same effect see *Wade* v. *Baker* (7 Ld. Ray., 131).

So it has been held in New Jersey, that a lease extending beyond the age of fourteen of the ward is voidable, and may be avoided by another guardian, chosen by the infant, after his arrival at fourteen. (*Snook* v. *Sutton*, 5 Halst., 183.)

It is stated that the office of testamentary guardian, up to twenty-one, and of guardian in socage up to fourteen, are the same; and a lease for twenty-one years by the testamentary guardian is absolutely void, when the heir attains twenty-one. "It follows, that a lease by the guardian in socage is void when the heir attains the age of fourteen." (McPherson on Infants, p. 36; *Roe* v. *Hodgson*, 2 Wils., 129, decided at 135.)

This precise point seems not to have been decided. As an original question, and in analogy to the authorities, there would seem to be a propriety in holding that the guardian could have no power to grant any more than his own title.

It is probably as well for the interests of the infant, as it seems sound in law, under the principles declared, to hold that the guardian may lease for a time as long as he continues guardian, or for any number of years within the minority of

the infant, subject to being defeated by another guardian being appointed pursuant to the statute.

It is urged here that one of these infants is under fourteen years of age, when this action was commenced. Under our statute, the age of fourteen has nothing to do with the rights of guardians. They continue only until another guardian is appointed, without any reference to the ward's age of fourteen. Another guardian may be appointed, as well before as after that age, under our statutes. (2 R. S., 151, § 5.)

The title and interest of a guardian in socage are superseded, under our statute, unlike any other guardian, without any fault on his part, by the appointment of another guardian, at any time.

I see no necessity for holding this lease void. It was voidable by the new guardian, and he properly signified his intention to avoid it at the end of the year.

All concur.

Judgment affirmed.

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WILLIAM M. TRACEY and JAMES WELSH, Respondents, *v.* ABRAHAM ALTMYER, impleaded, etc., Appellant.

An order denying a motion for a new trial on the ground of newly discovered evidence, cannot be reviewed upon the merits in this court. But where it appears that the merits of the application were not considered by the court below, from an erroneous supposition of want of power, and that the order was based upon that ground, it is appealable, and will be reversed in this court. It is incumbent upon the appellant, however, to show this affirmatively.

A motion can be made at Special Term for a new trial upon the ground, that the verdict is against the weight of evidence, or of surprise, of newly discovered evidence, of misconduct of the jury, or other ground after the entry of judgment on the verdict.

(Argued November 28th, 1871; decided December 5th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court of the first judicial department, affirming a

judgment in favor of plaintiff entered upon a verdict; also appeal from order affirming an order of Special Term denying a motion for a new trial, on the ground of surprise and newly discovered evidence.

The action was brought to recover for goods alleged to have been sold to defendants as partners.

The facts pertinent to the question raised on appeal from judgment, are sufficiently stated in opinion.

Subsequent to the entry of judgment on the verdict, a motion was made for a new trial on the ground of surprise and newly discovered evidence. The motion was denied with leave to renew. The renewed motion was also denied. In the opinion of the justice, before whom it was made, he states: "I think the motion too late after judgment; for that reason I deny the motion."

S. Hand, for appellant. The order denying a new trial is appealable. (*Bright* v. *Tyson*, 1 Burrow, 394; 3 Blk. Com., 388; G. & W. on New Trial, 1086.) The appeal being a matter of right, will be entertained. (*Matter of Duff.*, 41 How., 351; *People* v. *Sup. Court of N. Y.*, 10 Wend., 286, 398; *Tucker* v. *White*, 27 How., 97.) Reasonable time should be afforded for the exercise of this right. (*Burt* v. *Barlow*, 1 Doug., 170; *Nanevan* v. *Pearsall*, 6 How., 293; 3 Blk. Com., 386.) The rule against the motion, after judgment, frequently relaxed. (*Case* v. *Shepard*, 1 John. C., 245; *Grant* v. *Rowb.*, 3 Cow., 354.) The motion can now be made after judgment. (Laws of 1832, chap., 128; *Blydenburgh* v. *Johnson*, 9 Abb., N. S., 459; *Benedict* v. *Coffree*, 3 Duer, 669; *Nanevan* v. *Pearsall*, 6 How., 294; *Malony* v. *Dows*, 18 How., 27; *Morgan* v. *Bruce*, 1 Code R., U. S., 364; *Tucker* v. *White*, 27 How., 97.)

D. C. Calvin, for respondents. The order is discretionary and not appealable to this court. (*Selden* v. *D. and H. C. Co.*, 29 N. Y., 634; *Bedell* v. *Chase*, 34 N. Y., 386; *Lawrence* v. *Ely*, 38 N. Y., 42.) The motion was too late after judgment. (*Rapelye* v. *Prince*, 4 Hill, 119; *Gerney* v.

Smithson, 7 Bosw., 396; *Sheldon* v. *Stryker*, 27 How., 387; *Peck* v. *Hyler*, 30 Barb., 655; *Potter* v. *Potter*, at fifth district Gen. Term, not reported; *Jackson* v. *Fassett*, 7 Abb., 137; *Nash* v. *Wetmore*, 33 Barb., 155.) Defendant permitted case to be submitted without objection. He was too late after verdict to allege surprise. (*Thompson* v. *Porter*, 8 Bibb, 70; *Kirtly* v. *Kirtly*, 1 J. J. Marsh, 96; *Carr* v. *Gale*, 1 Curtis Ct. R., 384; *Kellogg* v. *Ballard*, 10 Wis., 440; Graham & Waterman on New Trials, 191; *McClure* v. *King*, 15 La. An., 220; *People* v. *Mack*, 2 Park Cr. R., 673; *Peck* v. *Hiller*, 30 Barb., 655.) The evidence was not newly discovered, but not recollected, and therefore, no ground of new trial. (*Gregg* v. *Bankhard*, 22 Texas, 245; *Johnson* v. *Blanchard*, 5 R. I., 24; *Bond* v. *Cutter*, 7 Mass., R., 205; 1 Graham & Waterman on New Trials, 477; *Daignan* v. *Wyatt*, 3 Blackf., 385.) The evidence sought was cumulative, and no ground for new trial. (1 G. & W. on New Trial, 486; *Gavock* v. *Brown*, 4 Humph., 251; *Kirby* v. *Waterford*, 14 Verm., 414; *Campbell* v. *Gennet*, 2 Hill, 290; *Fleming* v. *Hallenbeck*, 7 Barb., 271; *People* v. *Superior Court, etc.*, 5 Wend., 127; 10 id., 285; *Powell* v. *Jones*, 42 Barb., 24; *Parshall* v. *Klinck*, 43 Barb., 203; *Peck* v. *Hiler*, 30 Barb., 655; *Adams* v. *Bush*, 23 How., 262.)

GROVER, J. The only exception taken upon the trial, which was insisted upon by the counsel for the appellant upon the argument, was that taken to the refusal of the judge to grant a nonsuit. No ground for the motion was stated by the counsel, and it is well settled that such an exception cannot be sustained, for any defect in the plaintiffs' proof, which might have been supplied had such defect been pointed out at the trial. That is a sufficient answer to the exception. A further answer in the present case is, that there was no such defect. That urged upon the argument was that the evidence showing that the appellant was a partner with his co-defendants, was not sufficient to warrant the submission of that question to the jury. Wm. C. Williams, the salesman of the

plaintiffs, who were jobbers in dry goods in the city of New York, testified that one of the co-defendants came to the plaintiffs' store and purchased a bill of goods upon credit, and directed the goods to be forwarded by express to S. & A. R. Altmayer, at Newark, New Jersey. There was no dispute as to the two co-defendants being members of the firm; that he had been referred to the appellant by one of the co-defendants as to the trustworthiness of the firm; that he was directed by Mr. Wilson, one of the plaintiffs, to make inquiry as to that matter; that for that purpose he called upon the appellant and made the inquiry of him; that the appellant said that they were good for all that I could sell them; that he was interested with them; that he was responsible for what they bought; that he reported this conversation to Wilson, one of the plaintiffs. The latter testified that upon receiving this report, and in reliance thereon, he forwarded the goods to the firm as directed; that upon like reliance he subsequently sold to the firm the goods, for the price of which the action was brought.

This was sufficient to require the submission of the question, whether the appellant was a partner, to the jury; and if they found he was liable as such, not only for the goods then sold, but also for such as the plaintiffs subsequently sold, until they received notice that he was not a partner. The appeal from the order presents questions of greater difficulty. This order cannot be reviewed upon the merits by this court. (*Selden, Exrx.*, v. *Delaware and Hudson Canal Co.*, 29 N. Y., 634; *Bedell* v. *Chase*, 34 id., 386; *Lawrence* v. *Ely*, 38 id., 42.)

It may be so reviewed by the General Term. (Code, § 349.) The order denied a motion of the defendant for a new trial, upon the ground of surprise and newly discovered evidence. From the opposing affidavits it appeared that judgment had been entered. From the opinion of the judge at Special Term, it appears that the motion was denied solely upon the ground, that it could not be made after the entry of judgment.

This may, by this court, be taken as sufficient evidence that the merits of the application were not considered by the Special Term, but that it was not entertained from want of power in the court caused by the entry of judgment, although this court cannot review the order upon the merits; yet when the court has refused to consider the merits, from an erroneous supposition that it had no power so to do, and based the order upon that ground, it is appealable to, and will be reversed by this court. (*Russell* v. *Conn.*, 20 N. Y., 81.)

The question is, therefore, presented, whether a motion can be made at Special Term for a new trial upon the ground, that the verdict is against the weight of evidence, or surprise, or newly discovered evidence, or the misconduct of the jury, or other ground after the entry of judgment upon the verdict. There is obviously no distinction between this class of cases. If it can be so made in one it can in all; under the former system of practice it was settled, that all such motions could be made only before judgment. (*Rapelye* v. *Prince*, 4 Hill, 119.) A careful examination of the opinion of BRONSON, judge, in this case will show, I think, that he placed rather a technical construction upon section 1 of the act relating to the Supreme and Circuit Courts, Laws of 1832, 188, but that statute had nothing to do with the question before him, as the motion before him was made to the court in banc in the first instance, and the act in question required the motions thereby authorized to be made before the judge of the circuit, and provided for a review of the orders made by him upon appeal to the Supreme Court. Be this as it may, the decision was clearly correct according to the then existing practice. This practice originated probably in the rules of the Supreme Court adopted in 1799, and was convenient, and rarely could work injustice under that practice, as judgment could not be entered until the "*quarto die post*" of the next term of the court after the rendition of the verdict. This in most, and probably in all cases, gave the party desirous of making the motion sufficient time to ascertain the facts, preface his papers, and make the same before judgment could be entered;

or, if he could not do all this, to at least procure an order to stay the entry of judgment. After the adoption of the Code the question frequently arose, and the decisions have been conflicting in the courts of original jurisdiction, although the decided weight of this authority is against the power to entertain the motion after judgment. (*Morgan* v. *Bruce*, 1 Code Reports, U. S., 36; *Tucker* v. *White*, 27 Howard's Practice, 97; *Stilwell* v. *Staples*, 6 Robertson, 639; *Blydenburg* v. *Johnson*, 9 Abbott's Practice, U. S., 459.) The question comes before this court for the first time in the present case. It can now be settled in accordance with law. Under the former practice, some small inconvenience might have existed when the verdict was rendered, immediately preceding term, but even in such cases the party had four full days after its rendition, in which to protect his rights. In 1832, the legislature, with a view to relieve the court from the pressure of business, passed the act above referred to, providing for the hearing of a certain class of cases by the judge of the circuit, and foreseeing that by so doing a party might be deprived of his right to make a motion at all, unless permitted so to do after judgment, provided by the first section of the act, that when in any personal action, any bill of exceptions shall be taken, demurrer to evidence put in, or notice of motion given for a new trial on newly discovered evidence, and the proceedings shall not be stayed, the party in whose favor the verdict is rendered may perfect his judgment and issue execution, but it shall nevertheless be lawful for either party to proceed to obtain a hearing before the Supreme Court upon the matters in question, in the manner thereafter mentioned. This in effect abolished the existing rule of practice, denying the right to make the motion after judgment, and the right is given by this statute. The court before which it is to be made, has been changed by substituting the Special Term in place of the circuit judge, but the right to make the motion has not been impaired by any statute since passed, and still exists. The right to move for a new trial upon a case at Special Term is expressly given by

the Code. But the party obtaining the verdict has the right immediately to enter judgment thereon, unless his proceedings are stayed. Thus, if the motion cannot be made after judgment, the absolute legal right to make it, is converted into a right resting in the discretion of the court, whether or not to grant a stay of proceedings upon the verdict. This is a very different thing from the positive right given by law, and the former should not be substituted for the latter, unless pursuant to the manifest intention of a statute. But there is no such statute. It follows that the Special Term erred in refusing to entertain the motion and pass upon the merits, upon the ground that judgment had been entered. For this error the party is entitled to a reversal of the order, unless cured by the proceedings thereon at General Term. The order at Special Term is the usual one denying the motion. From that it does not appear whether it was made upon the merits or some other ground. It is from the opinion only, that it appears to have been denied, solely upon the ground that judgment had been entered. The General Term had the power to review this order upon the merits, and upon any and every ground connected therewith. In that court no opinion was given; all that appears is from the order made. That is simply an affirmance, not of the opinion of the Special Term, but of the order made. This is entirely consistent with the idea that the General Term considered the merits and determined the same, and based the order of affirmance thereon. It was its duty so to do; and the presumption is, that this duty was performed, until the contrary appears. It is incumbent upon a party seeking the reversal of a judgment or order, to show affirmatively that an error was committed to his prejudice. It is not sufficient to show that it may have been committed. The latter will not overcome the presumption, that all things have been transacted correctly, until the contrary appears.

The counsel for the appellant seeks to obviate the difficulty, by showing that Mr. Justice INGRAHAM, who sat as a member of the General Term upon the hearing of the appeal, enter-

tained the same opinion as the judge who heard the motion at Special Term. For this purpose, the papers used upon a like motion previously made before him in the present case at Special Term, and the order made by him thereon, have been inserted in the case. He gave no opinion. The order proceeds in the usual form, reciting the object of the motion and the papers used, the hearing of counsel, and proceeds: And it appearing that judgment was entered in the action on the 30th day of January, 1868; and concludes: It is ordered that the motion be, and the same is denied, with leave to renew the same on additional papers, on payment of ten dollars costs. This, so far from showing that Justice INGRAHAM was of opinion, that the motion could not be made after the entry of judgment, shows, I think, the contrary. Otherwise, leave to renew would not have been given, after it appeared that judgment had been entered. The renewal would have been entirely useless. Besides, I do not think it would aid the appellant if it appeared that Mr. Justice INGRAHAM, previous to the hearing of the appeal at General Term, entertained the opinion imputed to him by the counsel. The presumption would rather be, that he became convinced of his error upon the hearing, and united with his brethren in a decision in accordance with law. For the reason that it does not appear that the General Term reviewed the order and passed upon the merits, the order appealed from must be affirmed; and, no error having been committed upon the trial, the judgment must also be affirmed.

All concur.

Judgment and order affirmed.

ALBERT HORN, Respondent, *v.* WILLIAM A. KETELTAS, Appellant.

The rule that a deed absolute upon its face, can in equity, be shown by parol or other extrinsic evidence, to have been intended as a mortgage has been, upon the fullest consideration, deliberately established in this State, and will not be departed from.

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Statement of case.

The want of a personal agreement by the borrower to repay the money, is not conclusive evidence that the conveyance was not intended as a mortgage; but is a circumstance to be considered with the other circumstances in the case.

(Argued November 28th, 1871; decided December 5th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the second judicial district, affirming a judgment entered upon the decision of the court at Special Term in favor of plaintiff.

The nature of the action and the facts appearing therein, are set forth in the opinion.

A. J. Vanderpoel, for appellant. In the cases asserting the equity rule that parol evidence is admissible to show a deed absolute on its face is a mortgage, there was no other written agreement defining the rights of the parties presented. (*Hodges* v. *The T. M. and F. Fire Ins. Co.*, 8 N. Y., 416; *Despard* v. *Walbridge*, 15 N. Y., 374; *Van Dusen* v. *Worrall*, 3 Keyes, 311.) To constitute the relation of mortgagor and mortgagee, the remedies must be reciprocal. (*Hovenden* v. *Froud*, 181.) Under the writings, defendant would have no remedy against plaintiff for a deficiency on sale. (*Goodman* v. *Granson*, 2 B. & B., 274.) Parol evidence cannot be received, where the parties intended the instrument to be in the form in which it is, but only where by fraud, accident, or mistake, the agreement is not carried out. (*Cook* v. *Eaton*, 16 Barb., 139; *Taylor* v. *Baldwin*, 10 Barb., 582; *Webb* v. *Rice*, 6 Hill, 219; *McDonald* v. *McLeod*, 1 Iredell, 221; *Sturtevant* v. *Sturtevant*, 20 N. Y., 39.) Conditional sales are valid, and the time limited for re-purchase must be precisely observed or the right is lost. (*Sexton* v. *Hitchcock*, 47 Barb., 225.) An agreement to reconvey will not turn an absolute conveyance into a mortgage. (*Alderson* v. *White*, 2 De. G. & J., 97, 105.) Where conclusion of law can only be sustained on assumption that defendant is guilty of misdemeanor, no presumption will be indulged

in favor of judgment. (*Walsh* v. *Powers*, 43 N. Y., 23; *Duffy* v. *Masterton*, 44 N. Y., 556.)

J. S. Hill, for respondent. Courts of equity will not limit themselves to writing between the parties in determining whether an absolute conveyance is a mortgage. (*King* v. *Newman*, 2 Mumford, 40; *Prince* v. *Reardon*, 1 A. K. Marsh, 170; *Aldham* v. *Halley*, 2 J. J. Marsh, 114; *Flagg* v. *Mann*, 2 Sumner, 540; Greenl. Cruise, title 15, chap. 1, § 38; *Robertson* v. *Campbell*, 2 Call., 354; *Wharf* v. *Howell*, 5 Binney, 503; *Holmes* v. *Grant*, 8 Paige, 257.) This was a mortgage, not a conditional sale. (*Robinson* v. *Cropsy*, 2 ed., ch. 138; *Clark* v. *Henry*, 2 Cow., 324; *Holmes* v. *Grant*, 8 Paige, 257; *Walker* v. *Murray*, 31 N. Y., 401.) The defendant was a money lender. (*Conway's Executors* v. *Alexander*, 7 Cranch, 239.) The reason why courts lean so strongly toward holding the transaction to be a mortgage is to prevent usury and *extortion*. *Holmes* v. *Grant*, 8 Paige, 257: *Stever* v. *Stever*, 9 Serg. & Rawle, 447; *Hall* v. *Van Cleve et al.*, 11 N. Y. Legal Obs., 283; *Crane* v. *Bonnell*, 1 Green's Chan. Reps., 267; *Conway's Executors* v. *Alexander*, 7 Cranch, 240; *Clark* v. *Henry*, 2 Cow., 330, 331; *Vernon* v. *Bethill*, 2 Eden, 110; *Skinner* v. *Miller*, 5 Littels, 88; *McDonald* v. *McLoed*, 1 Ire. Eq., 226; *Poindexter* v. *McCann*, 1 Dev. Eq., 373; *Kunbrough* v. *Smith*, 2 id., 562.) Inadequacy of consideration is proof that a sale could not have been intended. (*Conway's Executors* v. *Alexander*, 7 Cranch, 240; *Flagg* v. *Mann*, 2 Sumner, 537; *Wharf* v. *Howell*, 5 Binney, 503; 3 Watts, 198; 2 J. J. Marsh, 114; 1 Eden, 58, 169; 11 N. Y. Leg. Obs., 282; 6 Metcalf, 482; 19 Vesey, Jr., 413; Pow. on Mortgages, 138; Note 1; *Glover* v. *Payne*, 19 Wendell, 520; *Edrington* v. *Harper*, 3 J. J. Marshall, 354; *Webb* v. *Paterson*, 7 Humph., 435; *Holmes* v. *Grant*, 8 Paige, 257; *Vide* also authorities in note to this case at pp. 259, 261.) The tendency of the court is to preserve rights of redemption. (2 Greenl., Cruise, title 15, chap. 1, § 38, note, citing Dev. Eq., Rep., 373; 5 Lit. 84; 2 J. J. Marsh, 471;

3 id., 354; 1 Green. Ch. Rep., 264; see also *Eaton* v. *Greene*, 22 Pick., 530; *Holmes* v. *Grant*, 8 Paige, 259, 261, the note in later editions); 1 Kent Com., marg. p. 144; *Flagg* v. *Mann*, 2 Sumner, 540; *Edrington* v. *Harper*, 3 J. J. Marshall, 356; *Secrest* v. *Turner*, 4 id., 471, are to the same effect.) The written agreement is part of same transaction, and relates back to deed. (*Crane* v. *Bonnell*, 1 Green, ch., 267: 4 Kent's Com., 160.) It is immaterial that agreement ran to Pelton instead of plaintiff. (N. Y. Stat. at large, vol. 1, p. 677, § 53; *Roach* v. *Cosine* 9 Wend., 232; *Holmes* v. *Grant*, 8 Paige, 287; *Slee* v. *Manhattan Co.*, 1 Paige, 56; *Weed* v. *Stevenson*, 1 Clark, Ch., 166.) The absence of covenant to repay immaterial. (9 Serge & Rawle, 428; 2 Atk., 296; 2 Wash., 14; *Flagg* v. *Mann*, 2 Sumner, 534.) The transaction perfect as a mortgage without it. (1 R. S., 738, § 130; *Hove* v. *Fisher*, 2 Barb. Ch., 570.)

ALLEN, J. The action is for equitable relief, and especially for an accounting by the defendant for the rents and profits and the avails of the sale of lands in Brooklyn, conveyed by the plaintiff to the defendant by deed absolute upon its face, but which, the plaintiff claims, was intended as a mortgage, to secure a loan of money. In 1859, the plaintiff applied to the defendant for a loan of $10,000, upon the security of the property named, and after some negotiation, the sum required was advanced to the plaintiff, upon the delivery of an absolute deed of the property; the defendant, by an agreement, executed and delivered simultaneously with the deed, but bearing date a day or two later, covenanting to sell and convey the same property to Mr. Pelton, upon the payment by him, within one year, of $12,500 and interest thereon, together with all taxes and assessments upon the premises, which the defendant should have paid.

The premises greatly exceeded in value the consideration paid for the deed; the grantor, Horn, was embarrassed and straitened for money. Mr. Pelton, the covenantee in the defendant's agreement, was counsel for the plaintiff in the trans-

action, aiding him in procuring the loan; and his testimony, as well as that of the plaintiff, was that the agreement was taken by him for the use and benefit and as the agent of the plaintiff, and to avoid the question of usury which, it was supposed, Horn could make, if the agreement to reconvey was directly to him; and the judge has found that the transaction took that form for that reason and no other, which is one circumstance tending strongly to show that the parties regarded the advance of the money as a loan, and the conveyance a mortgage.

The judge has found, upon testimony somewhat conflicting, but greatly preponderating, in connection with surrounding circumstances, in favor of the findings, that the advance of money was a loan, to be repaid at the end of one year; that the deed was delivered to and accepted by the defendant as a security for the repayment of the loan, with an additional sum agreed upon, and not as an absolute sale and conveyance of the property; and that the agreement for a conveyance to Pelton was for the benefit of the plaintiff, and in place of an agreement to reconvey directly to him, and for the reasons before stated, and that the papers were delivered simultaneously, and as parts of one transaction; and as a conclusion of law, it was adjudged that the plaintiff was entitled to the account demanded, the property having been sold, and a redemption impossible. It is now too late to controvert the proposition that a deed, absolute upon its face, may, in equity, be shown, by parol or other extrinsic evidence, to have been intended as a mortgage; and fraud or mistake in the preparation or as to the form of the instrument is not an essential element in an action for relief, and to give effect to the intention of the parties. The courts of this State are fully committed to the doctrine; and, whatever may be the rule in other States, here in passing upon the question, we have only to stand upon the safe maxim of *stare decisis*. It is not enough, in view of the fact, that the adjudications have entered into and controlled business transactions, and become a rule of property to authorize a reconsideration of

the questions, that the rule has been authoritatively adjudged otherwise as a rule of evidence in common-law courts, and that eminent judges have contended earnestly against its adoption as a rule in courts of equity. Notwithstanding their protests the rule has been, upon the fullest consideration, deliberately established, and cannot now be lightly departed from. The principle was recognized by the chancellor in *Holmes* v. *Grant* (8 Paige, 243.) Although it was not applied in that case, and had been before asserted under like circumstances in *Robinson* v. *Cropsey* (2 Edw. Chy. R., 138); affirmed (6 Paige, 480).

It was expressly adjudged in *Strong* v. *Stewart* (4 J. C. R., 167), that parol evidence was admissible, to show that a mortgage only was intended by an assignment absolute in terms; and to the same effect is *Clark* v. *Henry* (2 Cow., 324); which was followed by this court in *Murray* v. *Walker* (31 N. Y., 399). In *Hodges* v. *Tennessee Marine and Fire Insurance Co.* (4 Seld., 416) the court says, that "from an early day in this State the rule that parol evidence is admissible for the purpose named, has been established as the law of our courts of equity, and it is not fitting that the question should be re-examined, and the cases in which it has been so adjudged are cited with approval." In *Sturtevant* v. *Sturtevant* (20 N. Y., 39), the same judge, pronouncing the opinion as in the case last cited, distinguishes between the case of a mortgage and trust, and it was decided, that while a deed absolute, in terms, could be shown to be a mortgage, a trust in favor of the grantee could not be established by parol. And see *Despard* v. *Walbridge* (15 N. Y., 374). The rule does not conflict with that other rule, which forbids that a deed or other written instrument shall be contradicted or varied by parol evidence. The instrument is equally valid whether intended as an absolute conveyance or a mortgage. Effect is only given to it according to the intent of the parties, and courts of equity will always look through the forms of a transaction and give effect to it, so as to carry out the substantial intent of the parties.

It is not objected that the agency of Pelton for the plaintiff

in the transaction could not be shown by parol; and that fact being established, the only question was, whether the agreement with Pelton, which was, in truth, with the plaintiff, was intended simply as an agreement to re-sell the premises at an advanced price, or a defeasance giving a right of redemption. The fact being established by competent evidence that the money advanced by the defendant was advanced as a loan, and not on the purchase of the lands, the relation of debtor and creditor was established, and that relation being established, it necessarily followed that the conveyance in connection with the agreement to re-convey, was intended by the parties as, and was a security for the debt, and the maxim, "once a mortgage, always a mortgage," secured the debtor a right of redemption until his equity was foreclosed by the judgment of a court of competent jurisdiction. (*Newcomb* v. *Borham*, 1 Vern., 7; *Clark* v. *Henry*, *supra*.)

That there was no agreement in the defeasance for the payment of the debt, is a circumstance entitled to considerable weight, as tending to show that the conveyance was not intended as a mortgage, and that the relation of debtor and creditor did not exist. But it is only one of several circumstances to be considered, and is not conclusive; and the judgment of the court below upon the question of fact, the decision of which involved the consideration of this and the other circumstances, and the whole evidence is conclusive. In *Conway's Exr's* v. *Alexander* (7 Cranch, 218), Ch. J. MARSHALL says: "The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but is a circumstance of no inconsiderable importance." And see Per PUTNAM, J., *Flagg* v. *Mann* (14 Pick., 467). The question in this as in every case was, whether the contract was a security for the re-payment of the money, or an actual sale, and the evidence fully sustains the judgment of the court below that it was a mere security. The judgment is favorable to the defendant. The security might properly have been invalidated for usury, and the plaintiff had judgment for the proceeds of the sale of the lands without deducting

the money lent. But equity has been done. The defendant has been repaid the money loaned, with interest, and the plaintiff has judgment for the residue of the purchase-money for which the mortgaged premises were sold, and the plaintiff does not complain.

The judgment must be affirmed.

All concur.

Judgment affirmed.

ERASTUS W. CLARK, Respondent, *v.* PETER WISE et al., Appellants.

A case submitted under section 372 of the Code should present only questions of law.

Where all the facts upon which the controversy depends, and which are necessary to give ground for a conclusion of law are not stated, the court cannot pronounce the judgment desired.

The case submitted presented the following facts: Defendant, an insolvent, assigned all his property, real and personal, to H., an indorser, upon his paper, receiving good notes for the full value of the property, less the amount of the indorsements, payable in six, twelve and eighteen months.

Held, that from these facts the law would not of necessity conclude an actual fraudulent intent. But the question whether the transfer was fraudulent or not was one of fact remaining in dispute. Proceedings therefore dismissed.

(Submitted November 15, 1871; decided December 12, 1871.)

APPEAL from judgment of the General Term of the fifth judicial district, in favor of the plaintiff, rendered upon a case submitted under section 372 of the Code. (Reported below, 57 Barb., 416.)

The facts stated in the case are substantially as follows:

The defendant, Peter A. Wise, a manufacturer of hay elevators and jacks at Stockbridge, New York, having become insolvent and unable to pay his debts, sold all his stock in trade and real estate and personal property, except such as is

exempt from execution, to the defendant, Henry Horton, for the consideration of $10,962.21, that being its full value. Horton was liable as first indorser on two of Wise's notes for $892.53. In the transaction Wise handed over $859 in money, to enable Horton to pay the notes, and Horton, after deducting the amount of his indorsement gave back Wise his own notes for the remainder of the purchase-price, one-third payable in six months, one-third in twelve months, and the residue in eighteen months, without interest. The real estate amounted in value to $1,000. Horton's notes were perfectly good, and it is admitted that he had no actual interest on his own part to defraud the creditors of Wise.

This sale was on the 20th day of July, 1869, and on the 6th day of August, 1869, the plaintiff, Erastus W. Clark, obtained a judgment against Wise in the Supreme Court for $369.02 upon a cause of action which occurred May 2, 1869, and upon which an execution was duly issued and returned wholly unsatisfied. Horton knew of Wise's insolvency when he made the purchase.

It is also admitted that Wise afterwards fraudulently concealed and misappropriated a portion of the notes to his own use.

The question submitted is, whether the sale by Wise is fraudulent and void as against the plaintiff and his other creditors within the meaning of the staute.

H. N. Warner, for appellants. Fraudulent intent a question of fact, and not of law. (2 R. S., 142.) The notes were good and collectible. (*Scheitlin* v. *Stone*, 43 Barb., 634; *Matthews* v. *Rice*, 31 N. Y., 457; *Bedell* v. *Chase*, 34 id., 386.)

Edwin H. Risley, for respondent. The sale was fraudulent, being made with intent to hinder and delay creditors. (3 R. S., 5th ed., 224, § 1; *Browning* v. *Hart*, 6 Barb., 91; *Cook* v. *Smith*, 3 Sandf. Ch., 333; *Vance* v. *Phillips*, 6 Hill, 383; *Downing* v. *Kelly*, 49 Barb., 547; *Niles & Mott*, or *Mott & Niles*, v. *Shapley*, Court of Appeals, unreported case, decided October 29, 1849; *Cunningham* v. *Freeland*, 5 Paige,

564; 9 Johns., 100; 1 Cow., 240; 3 Sandf., 692; *Nicholson* v. *Leavitt*, 6 N. Y., 517, of opinion.) The General Term were right in holding the sale fraudulent, upon the facts admitted. (*Edgal* v. *Hart*, 9 N. Y., 213; *Mott* v. *Shapley*, *supra*, Judge GRAY'S opinion, pp. 47, 48, of case; 17 N. Y., 417; 2 Seld., 515; 12 Barb., 168, and cases cited; 24 N. Y., 632, opinion; 43 Barb., 456, opinion; 2 id., 9; 15 Mass., 459, 415; *Nicholson* v. *Leavitt*, 6 N. Y., 510; *Bullock* v. *Post*, 12 Barb., 168; *Rathbun* v. *Platner*, 18 id., 272; *Scheitlin* v. *Stone*, 43 id., 643, divided court; *Matthews* v. *Rice*, 31 N. Y., 457; *Bedell* v. *Chase*, 34 id., 386.)

FOLGER, J. This is a submission, without action, under section 372 of the Code of Procedure. As by that section, the parties to the question in difference are required to agree upon a case, containing the facts upon which the controversy depends, it follows that the court is to determine nothing but the questions of law arising upon the facts thus presented. (*Neilson* v. *Com. Ins. Co.*, 3 Duer, 455.) See also, the first report of commissioners of practice and pleading to the legislature (1848, p. 233). "This provision," they say in the comment upon the proposed section 325, which agrees *verbatim* with the present section 372, "it is believed, will be useful in many cases where a question as to a legal right exists between fair and honorable men, *there being no dispute about the facts.*" In the statement of facts in this case however, there is no agreement of what was the actual mental intent of the defendants, or either of them, in the transfer of the property from Wise to Horton. But such intent is to be found as a question of fact (2 R. S., 137, § 4; *Matthews* v. *Rice*, 31 N. Y., 457; *Vance* v. *Phillips*, 6 Hill, 433); and is to be determined as such only by the jury.

It must be then, as the court cannot find the intent as a matter of fact, that the only question presented which the court can decide is, whether from the facts not in dispute, the law will of necessity conclude an actual fraudulent intent. We are of the opinion that it will not. We do not say that

a jury may or may not from the facts agreed upon, find that there did exist a fraudulent intent. But it would be erroneous to instruct a jury that, upon the proof of the facts here agreed upon and no other, they were shut up to that verdict.

It follows, that the parties have not agreed upon all the facts upon which the controversy depends, and which are necessary to give ground for a conclusion of law. A case is not presented in which there is "no dispute about the facts." The very vital fact is in dispute. The court cannot pronounce the practical judgment desired by the parties, of whether the sale and transfer was or was not in fact, fraudulent and void.

The result would be, that if we were to give a final judgment, it would be against the plaintiff and in favor of the defendants. But this might preclude the plaintiff from any trial of an action in which the fact here lacking might be established perhaps, in his favor. So it seems most just and proper, while it is legal, to reverse the judgment of the court below and to dismiss this proceeding.

All concur. Judgment accordingly.

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BENAJAH COMSTOCK, Respondent, *v.* WILLIAM P. JOHNSON and PARLEY JOHNSON, Appellants.

The rule, "that he who asks equity must do equity," will be applied where an adverse equity grows out of the controversy before the court, or out of circumstances which the record shows to be a part of its history, or where it is so connected with the cause as to be presented in the pleadings, and proofs, with full opportunity afforded the party thus recriminated, to explain or refute the charges.

Defendant's ancestor conveyed to plaintiff's grantor certain real estate, on which stood a carding machine and clothing works, and shops; and also granted the privilege of drawing from their dam a sufficient quantity of water "for the use of said works." From the time of the grant, and for more than forty years, an open space in front of the mill, which belonged to defendants, had been used for piling and sawing wood for the use of the mill. Plaintiff placed thereon a buzz-saw propelled by the water from defendant's dam. Defendant thereupon, shut off the water, and

Statement of case.

plaintiff obtained judgment, enjoining defendants from depriving him of the water to which he was entitled under his deed.

Held, that the words used in the grant under which plaintiff held, were to be taken as a measure of quantity, and did not limit the use of the water to the particular machinery specified, and his use of the water to propel the buzz-saw did not work a forfeiture of the grant of the right to its use. But that plaintiff was not authorized, in erecting any machinery upon the land in front of his mill not necessary for its use as it had been used, and was in the wrong in placing and using the buzz-saw thereon. Judgment, therefore, modified so as to enjoin plaintiff from so using the buzz saw.

(Argued November 22d, 1871; decided December 12th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the sixth judicial district, affirming judgment in favor of plaintiff entered upon the decision of the court at Special Term.

This action was brought to restrain the defendants from diverting or withholding the waters of their mill-dam and flume on the Oaks creek, in the town of Otsego, from flowing to the carding machine and fulling mill of the plaintiff, situate on said creek below said mill-dam.

Prior to the 24th of January, 1824, William Johnson and James Johnson were the owners of lands on both sides of said creek, upon which were a dam, grist-mill, a saw-mill and a carding machine and clothing works, all run by water power from the same dam, and all owned by said Johnsons. On the 24th of January, 1824, the Johnsons conveyed to one Plumb the carding machine and clothing works, and the land whereon they stood, the terms of the deed in respect to the subject of the conveyance being as follows:

"Those certain pieces or parcels of land with the messuages and tenements thereon, situate, lying and being in the town of Otsego, aforesaid, and being the same on which the carding machine, and clothing works and shops, now occupied, etc., now stand, with the privilege of drawing from some convenient place from the mill-dam, situate on Oaks creek, immediately above said carding machine and clothing works, a sufficient quantity of water for the use of said

works, provided, nevertheless, that said works do not draw more than a fair proportion of the water from the grist-mill, which is situated on the same dam; that is, in time of scarcity of water, the said works shall be permitted to card and full the same length of time that the grist-mill grinds, and provided that no more machinery shall be put in operation for carding than a breaker, a roller, a picker, all to be single, together with the hereditaments and appurtenances thereunto belonging or appertaining; the grist-mill to have all the water on Sundays, except what will be necessary to scour cloth."

Plumb entered into possession of said carding machine and clothing works at the date of the deed to him, and used the open ground in front of the same, as a means of access thereto, and for piling wood for the works, and continued to occupy and enjoy the same until April 1st, 1842, when he conveyed the same premises and rights to the plaintiff, by a deed describing the subject of conveyance in the same manner as in the said deed to him, from the date of which deed to the time of the trial, the plaintiff has been in possession of the premises so occupied by said Plumb, occupying and enjoying them in the same manner. For about nine years past, the plaintiff has discontinued his fulling works, but still runs his carding machines with the water drawn from said dam.

For about the same length of time, and since the discontinuance of the clothing works, the plaintiff has every spring drawn water for a few days from the dam, for the purpose of operating a buzz or circular saw for sawing his own (and last spring his son's) firewood, and has been accustomed to run said saw, and saw wood in front of the clothing works and carding machine shop, about thirteen and one-fourth feet from the same, upon the open grounds in front of the same, being land not conveyed to said Plumb or to the plaintiff, but which belongs to the defendants, and constituting a part of their grist-mill yard, where teams of customers drive up to the grist-mill, and the clothing and carding machine

works, and have been so used since the giving of said deeds. The saw was placed at a point thirteen and one-fourth feet from the center of the highway leading across the creek, and horses going to the plaintiff's grist-mill, and along the said highway, were sometimes frightened by plaintiff's saw.

Less water was used by plaintiff in operating his saw than was necessarily used for operating his mill before it ran down.

On the 13th of April, 1867, the plaintiff was running his saw as aforesaid, when the defendants shut off the water from the plaintiff so that he could not run so much, claiming that he, the plaintiff, had no right to the water for that purpose. They also shut the water off from the carding machine, by firmly nailing a plank over the mouth of the trunk conveying the water from the big flume to the carding machine, declaring to the plaintiff at the same time, that he had forfeited his right to the water.

L. I. Burditt, for appellants. "He who seeks equity must do equity." (*Tripp* v. *Cook*, 26 Wend., 143, 160; *Bruen* v. *Hone*, 2 Barb., 586, 587; *Ludden* v. *Hepburn*, 3 Sandf., 668, 671; 5 How., 188; *Beekman Fire Ins. Co.* v. *First M. E. Church, N. Y.*, 29 Barb., 658, 660.) The running of the saw by plaintiff was a nuisance. (*Northrop* v. *Burrows*, 10 Abb., 365.) Defendants had a right to have an injunction restraining such nuisance. (*Howard* v. *Lee*, 3 Sandf., 281; *Peck* v. *Elder*, 3 Sandf., 126, and note at page 129.) The grant to plaintiff limits the purposes for which, and the place where the water was to be used. (Washburne on Easements, 2d ed., marg. page, 277; also see *Akley* v. *Pease*, 18 Pick., 268; *Shed* v. *Leslie*, 22 Vt., 498; *Garland* v. *Hodson*, 46 Maine, 511; *Deshon* v. *Porter*, 38 Maine, 289; *Strong* v. *Benedict*, 5 Conn., 210; *Cromwell* v. *Loomis*, 5 Seld., 423; *Wakely* v. *Davidson*, 26 N. Y.) The license to take water from the flume was parol and revocable. (*Mumford* v. *Whitney*, 15 Wend., 381; *Babcock* v. *Utter*, 32 How., 439; *Eggleston* v. *N. Y. and H. R. R. Co.*, 35 Barb., 162;

Washb. Real Property, 399.) If the evidence does not warrant the decision of the court below, this court will reverse it. (*Casler* v. *Shipman*, 35 N. Y., 533.)

E. Countryman, for respondent. The grant to plaintiff, as allowing a sufficient quantity of water for the use of his works. (*Cromwell* v. *Selden*, 3 N. Y., 253, 255; *Wakely* v. *Davidson*, 26 N. Y., 387, 394; *Olmstead* v. *Loomis*, 6 Barb., 152, 159; 9 N. Y., 427; *Fisk* v. *Wilbur*, 7 Barb., 395, 402.) The grant was absolute of the right to use a specified quantity of water for any purpose. (*Wakely* v. *Davidson*, 26 N. Y., 387, 394; *Olmstead* v. *Loomis*, 9 N. Y., 423, 427; *Borst* v. *Empie*, 5 N. Y., 33, 40; *Cromwell* v. *Selden*, 3 N. Y., 253, 256, 257.) Plaintiff was not limited to the particular mill or site in question. (*Hurd* v. *Curtis*, 7 Met., 94; Angell on Watercourses, §§ 146, 228; *Whittier* v. *Cocheco Manf. Co.*, 9 N. H., 454.) The deeds passed to the grantees all the land used with the mill and essential to its enjoyment. (*Blaine's lessee* v. *Chambers*, 1 Serg. & Rawle, 169; *Whitney* v. *Olney*, 3 Mason, 280; *Oakley* v. *Stanley*, 5 Wend., 523; Angell on Watercourses, §§ 155-159; 2 Kent's Commentaries, 420 and 1 marg.; 4 Kent's Commentaries, 467 marg.; *Huttemeier* v. *Albro*, 18 N. Y., 48, 51; *United States* v. *Appleton*, 1 Sumner, 492; *N. Ips. Factory* v. *Batcheldor*, 3 N. H., 190; *Hammond* v. *Zehnee*, 21 N. Y., 118.) Even if plaintiff was a trespasser on defendants' lands, they had no right to shut off the water. (*Belknap* v. *Trimble*, 3 Paige, 577; *Casler* v. *Shipman*, 35 N. Y., 533; Angell on Watercourses, §§ 445-447; 2 Story's Eq. Juris., § 927; *Olmstead* v. *Loomis*, 9 N. Y., 423; *Corning* v. *Troy Iron and Nail Factory*, 40 N. Y., 191.) Nor if the running of the saw by plaintiff was a nuisance. (*Harrower* v. *Ritson*, 37 Barb., 301.) Defendants' requests to charge were properly refused. (*Manley* v. *Ins. Co. of N. America*, 1 Lans., 20; *Casler* v. *Shipman*, 35 N. Y., 533.)

CHURCH, Ch. J. The principal question in this case, involving the construction of the grant of water, was correctly

decided in the court below. It is well settled in this State that the terms used in this grant are to be taken as a measure of the quantity of water granted, and not a limitation of the use to the particular machinery specified. (*Wakely* v. *Davidson*, 26 N. Y., 387; *Cromwell* v. *Selden*, 3 id., 253.) It was found by the court that, at the time the defendant shut the water off, he asserted that the plaintiff had forfeited his right to the water, and claimed a right to shut it off. In this he was mistaken. In depriving the plaintiff of the use of the water under an assertion of forfeiture, he rendered himself amenable to the process of the court for the protection of the plaintiff's rights. The judgment enjoining the defendants from depriving the plaintiff of the quantity of water to which he was entitled under his deed, cannot be disturbed. The only serious question in the case relates to the use of the buzz saw in front of the mill. The plaintiff did not, by his deed, acquire the title to the land in front of the mill, because the description is limited to the land upon which the mill stands; but he did acquire an easement in such land for the purpose of ingress and egress, and also for the purpose of piling and sawing wood for the use of the mill, as it had been used and enjoyed for forty years. Everything necessary for the full and free enjoyment of the mill passed as an incident, appurtenant to the land conveyed. (2 Kent's Com., 467; *Blaine's Lessee* v. *Chambers*, 1 Serg. & Rawle, 174.) But this would not authorize the plaintiff to erect and use machinery upon this land not necessary to the use of the mill, as it had been used, and would not authorize the use of the buzz saw upon that land. The objection is not that the plaintiff propelled the buzz saw with the water from the dam, as he had the right to use the water for any machinery and in any place which he was entitled to occupy; but he could not occupy the space in front of the mill for that purpose. At the time the water was shut off by the defendants, it was being used only to propel this saw; and it is claimed that the defendants were justified in shutting off the water from that machinery, and for that reason the judgment should be

reversed, or, at least, that it should be modified so as to restrain the plaintiff from using his buzz saw on the defendants' premises. As we have seen, the judgment against the defendants is fully warranted by the findings; and the question is, whether any modification should be made against the plaintiff. It is a rule of equity that he who asks equity must do equity. The plaintiff was in fault in using the buzz saw on the defendants' premises. It is said that this was an independent transaction, for which the defendants might have an action; and this was the view of the court below. The rule referred to will be applied when the adverse equity grows out of the very controversy before the court, or of such circumstances as the record shows to be a part of its history, or is so connected with the cause in litigation as to be presented in the pleadings and proofs, with full opportunity afforded to the party thus recriminated to explain or refute the charges. (*Tripp* v. *Cook*, 26 Wend., 143; *McDonald* v. *Neilson*, 2 Cow., 190; *Casler* v. *Shipman*, 35 N. Y., 533.)

All the facts connected with the right of the plaintiff to use the buzz saw were not only spread out upon the record, but were in fact litigated upon the trial, and, as to his strict legal rights, are undisputed; and we cannot say that, but for his use of the saw on the defendants' premises, the water would not have been shut off. Whether this was so or not, the controversy in relation to his right to use the saw was involved in the litigation, and was intimately connected with the wrongful act of the defendants; and, being so, it is proper to apply the equitable rule. It is not indispensable to the application of this rule that the fault of the plaintiff should be of such a character as to authorize an independent action for an injunction against him. The plaintiff, in strictness, was in the wrong in placing his buzz saw in front of the mill. The defendants were in the wrong in shutting off the water, and especially in asserting a forfeiture; and, as both parties are in court to insist upon their strict legal rights, we think substantial justice will be done by modifying the judgment so as to enjoin the plaintiff from using the buzz saw on the

land in front of his mill, and, as modified, judgment affirmed, without costs to either party against the other in this court.

All concur.

Judgment accordingly.

EDWARD HALL and ORLANDO LEWIS, Respondents, v. MORGAN AUGSBURY et al., Appellants.

Where the parties maintaining and using a dam upon a stream below plaintiff's dam, had for more than twenty years used flush boards upon their dam, more or less, at different seasons of the year, which were so far removed when they materially interfered with plaintiff's mill by flowing back water upon his wheel, and when complaint was made, as to satisfy the demand, but were not entirely removed, one board being almost, if not quite universally left on after complaint, without further objection.

Held, that the proprietors of the lower dam had acquired a prescriptive right to place and use flush boards thereon to a height, that would not materially obstruct the action of plaintiff's mill wheels. The right to be measured and limited only by its non-injury to the use of plaintiff's mill.

(Argued November 29th, 1871; decided December 12th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court in the seventh judicial district, affirming a judgment in favor of plaintiff, entered upon the report of a referee.

The action is brought to restrain defendants, from placing flush boards upon a dam known as the prison dam across the Owasco river, which plaintiffs alleged set back water upon their premises above.

The plaintiffs are the owners and occupants of a flouring and grist mill on the Owasco river, in the city of Auburn, which mill was erected in 1865.

The defendant, Morgan Augsbury, was the agent and warden of the Auburn prison, and the other defendants are contractors in the prison, entitled to the use of all the water power belonging thereto.

The plaintiffs' dam crosses the river above Genesee street. The prison dam crosses the river at the prison and below State street, and is the next dam below that of the plaintiffs. The defendants had placed and kept flush boards upon the prison dam, and thereby flowed the water back upon the plaintiffs' premises and upon the wheels of their mill.

About the 10th of May, 1867, the flush boards were swept off by a flood, and this action was commenced.

The further facts pertinent to the points discussed and decided appear in the opinion.

C. B. Sedgwick, for appellants. If Augsbury, as a State officer, is in charge of the prison and dam, a single judge or referee had no power to grant injunction. (Laws of 1851, chap. 488, § 182; Code, § 219, note 6, 9th ed.; Citing several cases; *How* v. *Searing*, 11 Abbott, 28; Same case, 6 Bosworth, 584; see statute in relation to State prisons; 1 R. S. Edmonds' ed., 214; 2 R. S., Edmonds' ed., 786, 789, 797.) A right to use flush board may be acquired by prescription, although not kept up continuously. (*Marcly* v. *Shultz*, 29 N. Y., 346; Washburn on Easements, chap. 3, §§ 3-46; 5 Metcalf, 257; Angell on Watercourses, § 224; 16 Pickering, 241.) Defendants did not forfeit any actual rights by raising the height of flush board beyond it. (Washburne on Easements, chap. 3, §§ 3-46; *Goodrich* v. *Burbank*, 97 Mass., 22; *Bruce* v. *Yale*, id., 18.)

D. Wright, for respondents. Neither the State nor defendants have acquired title, by prescription, to use flush boards. (*Flora* v. *Carbeau*, 38 N. Y., 111.) Plaintiffs are entitled to a perpetual injunction, restraining and enjoining defendants. (*Corning & Winslow* v. *The Troy Iron and Nail Factory*, 39 Barb., 311; 34 Barb., 492; 40 N. Y., 191.)

PECKHAM, J. This suit was properly instituted in equity to settle the rights of the parties in the use of the water in the Owasco river; and the judgment therein is, in the main, sustained by the findings and by the law. Yet manifest

injustice is done to the defendants, or to the State, if they represent the State in one respect. The judgment perpetually enjoins the defendants from putting, or allowing to be put, "any flush boards or fixture of any kind whatever upon the dam which crosses the Owasco river below State street bridge, in the city of Auburn, called the State prison dam; and from in any-wise, obstructing the free flow of the water of said river over said dam."

This absolute prohibition against putting on any flush boards at any time, is warranted neither by the facts found nor by the evidence.

The evidence shows the use of flush boards, more or less, at different seasons of the year, ever since the State dam has been built. But they were always removed when they materially interfered with the use of the plaintiff's mill, by flowing back the water upon the whole of that mill. They were rarely, if ever, entirely removed by reason of their interference with the plaintiff's enjoyment of his mill. But where complaint was made that the flush boards did cause the wheels of that mill to be overflowed, and thus prevent their proper use, the boards were so far removed as to satisfy the demand, yet almost, if not quite universally, one board was left on after complaint made, without further objection by the proprietors of plaintiff's mill, one board of some ten to twelve inches in width. Its retention there seems to have been satisfactory to the proprietors of the upper mill. It does not appear to have been claimed until after 1850 by the occupants of the State dam, or by the officers or agents of the State at the Auburn State prison, that they had the right to keep flush boards on their dam, if it overflowed the plaintiff's mill wheels to their injury. But there were times in each year when the boards were on without complaint; and it is neither distinctly proved nor found that the complaints ever extended to the removal of the lower flush board.

The complaint was always satisfied where the boards were so far removed, as not materially to interfere with the use of plaintiffs' wheel by back water.

Depriving the lower dam of the use of any flush boards at all seasons of the year, whether to the injury of plaintiff's mill or not, is obviously, from the proof, a serious injury and loss to the proprietors of the lower dam.

In the qualified manner, at the time of year above expressed, the proprietors or occupants of the lower dam, have always maintained one or more flush boards thereon since it was built, and for more than twenty years, and by this user, have acquired a right to place them there, when not materially detrimental to the use of plaintiff's mill, have acquired the right so to use the waters of that river; a right that cannot be measured by a board of any particular width, for it has not been so used, but to be measured and limited only by its non-injury to the use of plaintiff's mill.

There was never any complaint against the use of flush boards on the lower dam, except so far as they backed the water upon the wheels of the upper dam to their injury. That they have been put on much higher, and been so used to plaintiff's injury, does not forfeit the actual right of defendants. (*Belknap* v. *Trimble*, 3 Paige, 577; *Baldwin* v. *Calkins*, 10 Wend., 169.) Title by prescription is measured by the extent of the possession. (Wash. on Ease't., etc., § 25.) The enjoyment must have been adverse under a claim of right, exclusive and continuous. (Id., § 26, and cases cited in note.) It must be of some thing which one party could have granted to the other. (Id.) But an adverse enjoyment of an easement for twenty years will establish an easement, though the party against whom it is claimed may have suffered no actual damage from such enjoyment, provided it was an invasion of a right. (Id., § 30; *Bol. Man. Co.* v. *Nep. Man. Co.*, 16 Pick., 241.) The party might sue for the injury, and would be entitled at least to nominal damages. (*Parker* v. *Foote*, 19 Wend., 309.) If any flush board was put, or kept on, only by permission of plaintiff, no right by prescription is made out. (*Sumner* v. *Tileston*, 7 Pick., 198.)

Here the defendants, and those under whom they claim, had no right to raise the water by flush boards, or otherwise,

on the plaintiff's premises, higher than it naturally ran, even though such increased height did not back water upon plaintiff's mill wheels, so as materially to obstruct their action.

The plaintiffs had a right to have the water run as it had been accustomed to run, in height and in speed, through their land. (Wash., § 95, and notes and cases cited.) *Non constat*, that the plaintiffs might not wish to use that natural power by other mills, or otherwise.

But the use of that stream by defendants and others every year, by a flush board at different times, to raise the water above its natural height, and up to a level with plaintiff's wheels, but not materially to obstruct them, has been uniformly exercised, never interfered with by plaintiffs, so far as the case shows, though the use was well known to them, and the right so to put on and use a flush board, one or more, was never asked of plaintiffs, nor permission granted to do so.

When the height materially obstructed plaintiff's wheels, then it was conceded on both sides that it should be reduced, but only so low as to satisfy complaint on that ground. This was so prior to 1864, and for over twenty years.

There is nothing in the whole case at war with this position, hence the decree should be so modified as to allow the defendants to continue the use of flush boards at such stages of the water, as they may be used without material injury to plaintiff's mill by back watering the water wheels. If the use of the flush board, where it did not interfere with plaintiff's wheels by overflowing them, caused no damage whatever to plaintiffs, and violated no right for which an action would lie, then the defendants had a clear right so to use the flush boards without any previous grant by prescription, and the judgment is too broad upon that ground.

There is no practical difficulty in executing such a decree. If the defendants violate it, they can be summarily punished. The beneficial interests of all parties are thus preserved.

Judgment thus modified, affirmed without costs to either party in this court.

ALLEN, GROVER, FOLGER and RAPALLO, JJ., concur.

CHURCH, Ch. J., concurs in result, on the ground that plaintiff only asks protection against back water on the wheels of his mill.

Judgment accordingly.

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SYLVESTER S. STODDARD, Appellant, *v.* LEWIS E. WHITING, Respondent.

Where, in an action tried by a referee, the case does not contain any of the evidence, but simply the referee's findings of fact and conclusions of law, the presumption is, that there was no evidence from which any other facts could be found, and where the conclusions of law are excepted to the question is, whether such conclusions are warranted by the facts found. (*Chubbuck* v. *Vernam*, 42 N. Y., 438, explained.)

A. S. entered into a written contract with the owner for the purchase of a parcel of land, and under it went into possession. Not being able to pay the purchase-money at the time fixed by the contract, he made a parol agreement with defendant, by which the latter agreed to and did pay a portion of the purchase-price, took the title and gave his bond, secured by a mortgage upon the land, out of the avails of which the balance was paid. It was agreed that defendant was to hold the title as security for the money advanced, the liability incurred, and certain other claims against A. S. A. S. continued in possession for two years. Defendant then entered into possession, no portion of the money advanced or secured having been paid him. By an instrument in writing, not under seal, A. S. assigned to plaintiff all his right, title, and interest, legal or equitable, in the premises.—*Held*,

1st. That by the contract with the vendor, A. S. became vested with the equitable title to the land, which interest was capable of being mortgaged; and that under the agreement with defendant the latter took and held the title as mortgagee, subject to the right of A. S. to redeem.

2d. That the terms of the assignment by A. S. to plaintiff, were sufficient to embrace and transfer the equity of redemption, and as an incident thereto, the right to an account of the rents and profits; and that as it was not a grant, in fee, or of a freehold interest, a seal was not requisite to its validity, nor was it invalidated by the fact of defendant being in possession, and denying the right of redemption.

(Argued November 29th, 1871; decided December 12th, 1871.)

Statement of case.

APPEAL from judgment of the General Term of the Supreme Court in the fourth judicial district, affirming a judgment in favor of defendant, entered upon the report of a referee.

The action is brought by plaintiff, as assignee of Abiel Stoddard, to redeem certain real estate, alleged to have been conveyed to defendant, as security for the repayment of certain advances made and liabilities incurred by him. The facts are sufficiently set forth in the opinion.

A. Pond, for appellant. The contract of vendor with Abiel Stoddard, vested in the latter the equitable title which the former held as trustee for him. (*McKechnie* v. *Sterling*, 48 Barb., 330; *Moore* v. *Burrows*, 34 id., 173; *Sanders* v. *Aldrich*, 25 id., 70; *Rood* v. *N. Y. and Erie R. R. Co.*, 18 id., 83; *Van Allen* v. *Humphrey*, 15 id., 557; Story's Eq., §§ 789-792, 1212.) The title taken by defendant was a new mortgage title, and Abiel Stoddard had the right to redeem. (*Ryan* v. *Dox*, 34 N. Y. Rep., 307; *Murray* v. *Walker*, 31 id., 399; *Van Duzen* v. *Worrell*, 3 Keyes, 311; *McBurney* v. *Wellman*, 42 Barb., 390; *Tibbs* v. *Morris*, 44 id., 139; *VanBuren* v. *Olmstead*, 5 Paige, 9; *Lane* v. *Sears*, 1 Wend., 433; *Sweet* v. *Mitchell*, 15 Wis., 641; *Elliott* v. *Wood*, 53 Bar., 285, 302; *Ellsworth* v. *Lockwood*, 42 N. Y., 89, 94; *Brown* v. *Jones*, 46 Bar., 400; *Bucklin* v. *Bucklin*, 1 Keyes, 147; *Case* v. *Carroll*, 35 N. Y., 390.) Parol evidence was admissible to show the deed a mortgage. (*Van Duzen* v. *Worrall*, 3 Keyes, 311; *Hodges* v. *Tenn. Ins. Co.*, 4 Seld., 416; *Ryan* v. *Dox*, 34 N. Y., 307; *Tibbs* v. *Morris*, 44 Barb., 139; *Van Buren* v. *Olmstead*, 5 Paige, 9; *Lane* v. *Sears*, 1 Wend., 433; *Sweet* v. *Mitchell*, 15 Wis., 641.) The interest of Abiel Stoddard was equitable only, and no seal was necessary to render assignment valid. (*Jackson* v. *Seeley*, 16 Johns., 197, 199; and see *Olcott* v. *Wood*, 14 N. Y., 32; *Wadsworth* v. *Wendell*, 5 Johns. Ch., 224; *Bissell* v. *Morgan*, 56 Barb., 369, 374.) Nor was assignment void because plaintiff was in possession, claiming to hold adverse

to Stoddard. (*Borst* v. *Boyd*, 3 Sandf. Ch., 507; *Chalmers* v. *Wright*, 7 Rob., 713.) The language of assignment was broad enough to transfer all of Abiel Stoddard's interest. (*Borst* v. *Boyd*, 3 Sandf. Ch., 501, 509; *Waldron* v. *Willard*, 17 N. Y., 466; *The Oneida Bank* v. *The Ontario Bank*, 21 id., 490; *Springsteen* v. *Samson*, 32 id., 703.) The transfer being sufficient as between the parties, defendant cannot question it. (*Hooker* v. *Eagle Bank*, 30 N. Y., 83; *Nelson* v. *Eaton*, 26 id., 410; *Flagg* v. *Munger*, 5 Seld., 483, 492; *Clark* v. *Titcomb*, 42 Barb., 122, 124; *Nelson* v. *Edwards*, 40 id., 280; *Moore* v. *Burrows*, 34 id., 173; *Seaman* v. *Van Rensselaer*, 10 id., 81; Will. Eq. Jur., 460; *Van Ettan* v. *Currier*, 3 Keyes, 331.) The referee's conclusions of law are to be reviewed, on the assumption that the facts stated by him are correctly found. (*Flora* v. *Carbeau*, 38 N. Y., 111, 113; *Fake* v. *Whipple*, 39 Barb., 339, 345; *Ward* v. *Kalbfleish*, 21 How., 283–285; *Myers* v. *Betts*, 5 Denio, 81; *Heeley* v. *Barnes*, 4 id., 73; *Tappan* v. *Butler*, 7 Bosw., 481, 487; *Bascom* v. *Smith*, 31 N. Y., 595, 605.) Defendant is not entitled to compensation for his services, as he devised the land. (*Ireland* v. *Potter*, 25 How., 175; *Moore* v. *Cobb*, 1 Johns. Ch., 388.)

J. A. Shoudy, for respondent. This court will assume, in support of judgment, that the referee found not only facts stated in report, but all other necessary ones which the evidence tended to prove. (*Valentine* v. *Conner*, 40 N. Y., 254.) The evidence not being in case, the judgment should be affirmed. (*Chubbuck* v. *Vernam*, 42 N. Y., 432; *Freeman* v. *Freeman*, 43 id., 37.) A party seeking relief in equity must prove the particular agreement alleged. (*Philips* v. *Thompson*, 1 Johns. Ch., 131; Willard's Eq. Jur., 286; Fry, § 287; *Wolfe* v. *Frost*, 4 Sandf. Ch., 72.) Equitable jurisdiction is only exercised to prevent fraud and injustice. (Fry, § 288; *Buckmaster* v. *Harrop*, 7 Ves., 346; *Lowry* v. *Tew*, 3 Barb. Ch., 413; *Freeman* v. *Freeman*, 43 N. Y., 34.) The referee has found no fraud, and in the absence of evidence, this can-

not be disputed. (*Lobdell* v. *Lobdell*, 36 N. Y., 330.) Under the statute of uses and trusts, when consideration is paid by one, and with his consent, title is vested in another, no interest vests in the former. (*Garfield* v. *Hatmaker*, 15 N. Y., 475; *Sturtevant* v. *Sturtevant*, 20 id., 39; *Brown* v. *Cherry*, 59 Barb., 628; *Loomis* v. *Loomis*, Albany Law Journal of November 4, 1871, to appear in 60 Barb.) If plaintiff's assignment passed any interest, it was only by way of mortgage, and, as mortgagee, he only has a lien. (*Stewart* v. *Hutchins*, 13 Wend., 485.)

GROVER, J. The counsel for the respondent insists, that as the case does not contain any of the evidence given upon the trial before the referee, but only the facts found by him, and his legal conclusions thereon, and the exceptions taken by the appellant to such legal conclusions, no question is presented that can be reviewed by this court, and cites in support of this position *Chubbuck* v. *Vernam* (42 N. Y., 432). In the syllabus of the reporter it is stated, that when the case contains none of the evidence, and only the findings of fact and conclusions of law of the referee, an exception to the conclusions of law as not authorized by the facts found, is not good. One of the opinions delivered sustains this idea. The learned judge says, a party seeking to uphold the report of the referee is entitled to the benefit not only of the facts actually found by the referee, but also if necessary to sustain the conclusions of law found by the referee, to all such facts as the evidence tended to prove, and as the referee might have found in his favor. Hence without examining the case further there would be abundant reason for affirming the judgment. This entirely overlooks the obvious fact, that in the absence of all the evidence, it can never appear that there was any evidence tending to prove any additional facts, and therefore authorizing an assumption of the finding of any such facts. The judge did not base his judgment upon this ground alone, but proceeded to show that from the facts the conclusions of law were correct. In the other opinion published, no allusion is

made to any such reason for the affirmance of the judgment. This shows that no such question was determined in the case. The true rule where the case does not contain any of the evidence but the finding of facts only, is to assume that there was no evidence from which any other fact could be found, and where the conclusions of law in such a case have been excepted to, the question to be determined is, whether such conclusions are warranted by the facts found. That is the question in the present case. From the facts found it appears that in April, 1864, one Abiel Stoddard entered into a written contract with the owner for the purchase of a parcel of land situate in the county of Saratoga, for the sum of $2,500, to be paid in one year, upon payment of which he was to receive a conveyance of said land from the vendor; that he entered into possession of the land by the consent of the vendor; that about the time the purchase-money became due, being unable to pay it, he entered into a parol contract with the defendant, by which he was to advance for him to the vendor $500 and receive a conveyance from the vendor of the land in his own name, and upon receiving such conveyance execute to one Davison a mortgage upon said land for $2,000, together with his bond for the same amount, with the proceeds of which the vendor was to be paid the balance of the purchase-money; that it was further agreed that the defendant should hold the title thus acquired, as security for the money advanced by him and the liability incurred, and also as security upon another transaction between the parties, and permit Stoddard to redeem the same in one year, or at some time thereafter which was not particularly specified; that this agreement was so far executed, that in pursuance thereof the vendor was paid, and a conveyance of the land executed to the defendant; that Stoddard continued in possession of the land for about two years, receiving the profits thereof, and made improvements thereon to the amount of $200. That at the expiration of that time the defendant entered into possession, and has since received the rents and profits, and cut and removed timber therefrom of considerable value. That

Stoddard has not paid the defendant the money advanced by him, or any part thereof. That Stoddard, before the commencement of the action, by an instrument in writing by him signed, but not sealed, for a valuable consideration assigned and transferred to the plaintiff all his right, title, and interest in and to the premises, whether legal or equitable. From these facts the legal conclusions of the referee were, that the plaintiff was not entitled to redeem; that the defendant was the legal owner of said land, freed from any legal or equitable lien or interest of the plaintiff. To which the plaintiff excepted. The question is, whether these conclusions are correct. The agreement of the vendor to sell and convey the premises made with Abiel Stoddard, vested in him the equitable title to the land, and made him his trustee of the legal title, while he became the trustee of the vendor of the purchase-money. (Story's Equity, §§ 789, 792, 1212; *McKechnie* v. *Sterling*, 48 Barb., 330; *Moore* v. *Burrows*, 34 id., 173.) This equitable interest in the premises was capable of being mortgaged. (*Murray* v. *Walker*, 31 N. Y., 399.) A deed absolute upon its face, may be shown by parol to have been intended as a security, and if so shown, will be held to be a mortgage. (*Clark* v. *Henry*, 2 Cown., 327; *Van Buren* v. *Olmstead*, 5 Paige, 9; *Hodges* v. *The Tennessee Fire, etc., Co.*, 4 Selden, 416; *Van Duzen* v. *Worrell*, 3 Keyes, 311.) When the owner of the equitable title directs his trustee of the legal title to convey such title to a third person as security for a debt of the former to the latter, or as security for any other person, it is obvious that the latter holds such title as mortgagee of the former. That he did direct such conveyance for such a purpose may be shown by parol. This is equally as clear as that an absolute deed may be so shown to have been intended by the parties as a security, and therefore, a mortgage. Whether the legal title is held by the party wishing to mortgage the land, and the deed, therefore, given by him, or such title held by a third person as his trustee, who conveys the same at his request, does not affect the rule in this respect. The counsel for the respondent made an able argument, to

show that the facts found by the referee, were not such as to warrant the court's decreeing specific performance of the contract between the defendant and Abiel Stoddard. But that is not the relief sought by the action. That relief is a redemption by the mortgagor of the premises from the mortgagee, and the rules governing cases of specific performance have no application. As was said in *Case* v. *Carroll* (35 N. Y., 385, by DENIO, J.), in equity the relations of the parties were those of mortgagor and mortgagee, and the equity of redemption could not be cut off without a strict foreclosure or foreclosure and sale in a court of equity. The way to dissolve such a relation is well settled, and that is, to call upon the mortgagor to redeem or be foreclosed. It follows, that from the facts found by the referee the plaintiff was entitled to redeem; and it appears from the opinion that such was the conclusion of the General Term, but for the obstacles hereafter commented upon. The first ground taken by the General Term was, that there was no seal affixed to the instrument by which Abiel Stoddard attempted to transfer his interest in the premises to the plaintiff, and that for this reason, it was void. For this, the learned judge relies upon section 137 (1 R. S., 738). But that section includes only grants in fee, or of freehold estates in land. The interest transferred by Abiel Stoddard to the plaintiff was neither of these estates, but simply an equitable right of redemption. Consequently, the statute has no application to this case. The learned judge also refers to section 6 (2 R. S., 134). That section provides, that no estate or interest in lands, other than leases for a term not exceeding one year, etc., shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by a deed or conveyance in writing, subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent thereunto authorized by writing. The instrument in question was subscribed by Abiel Stoddard. We have already seen that the interest transferred was not such as to bring the case within the provisions of section 137 (1 R. S., 738), and that, there-

fore, a seal was not requisite to the validity of the instrument It is further said that the instrument executed by Abiel Stoddard was not sufficient to transfer his right of redemption to the plaintiff. The language of that instrument is, so far as applicable to this question, "all of my right, title and interest whatever to the land," describing it. This is sufficient to embrace an equity of redemption; and the right to an account of the profits, etc., received by the defendant passed therewith as an incident thereto. The remaining ground suggested, but not passed upon in the opinion, was, that the instrument purporting to transfer the interest of Abiel Stoddard to the plaintiff was void, for the reason that, at the time of its delivery, the defendant was in possession of the land, claiming adversely to the plaintiff. No such fact is found by the referee; but reference is made to the complaint. That states, in substance, that the defendant was in possession, and denied the right of Abiel Stoddard to redeem. No authority is referred to; but I apprehend that the learned judge had in view section 147 (1 R. S., 739). That provides that every grant of lands shall be absolutely void, if, at the time of the delivery thereof, such lands shall be in the actual possession of a person claiming under a title adverse to that of the grantor. But it was not a grant of the lands, but of the equity of redemption, that was transferred by the instrument. (See *Bissell* v. *Morgan*, 56 Barb., 369.) It follows, that the judgment entered upon the report of the referee, and that of the General Term, affirming the same, must be reversed. From the facts found by the referee, it must be adjudged that the plaintiff has the right to redeem. But the referee has taken the accounts, and determined the sum to be paid by the plaintiff for the redemption, in case he has that right, on the first day of April, 1869. That sum is $2,787.88. This includes the $2,000, the amount of the mortgage given to Davison, as paid by the defendant. If this has actually been paid by him, that amount appears to be correct. If any portion of that remained unpaid, such portion should be deducted from that amount. The counsel for the appellant insists that the items

allowed to the defendant for his services should be shut out. But the referee found, in substance, that the defendant was to hold the title as security for these services, as well as for the money advanced by him. I see no reason why the finding of the referee, in this respect, should be interfered with. The general rule is, that a party, coming into court, asking for a redemption, must pay all the costs, although found entitled to the relief sought. But this rule is only applicable to cases where the conduct of the defendant is, in all respects, fair and equitable. That is not so in this case. The defendant has resisted the plaintiff's right, and persistently litigated the same. In this he is found in the wrong, and should not, therefore, recover costs. The plaintiff's assignor was not prompt in the assertion of his right, and, by his laches, the expense of the accounting was rendered necessary. The plaintiff, as his assignee, is in no better situation than his assignor would have been had he instituted the suit. I think a proper disposition of the case will be, to reverse the judgment below, and order judgment upon the facts found by the referee, declaring the plaintiff entitled to redeem by paying the amount above stated, in case the defendant has satisfied the Davison mortgage in full, and if not, the amount due thereon in April, 1869, to be deducted from the amount so to be paid by the plaintiff; a reference to be had to determine this fact, and take and state the proper account from that time to the time fixed for the payment of the money, such payment to be made in —— months after the determination of the amount to be paid, and, in case such payment is not so made, the plaintiff to be foreclosed of all right of redemption and of all claim to the premises, without costs to either party as against the other.

All concur.

Judgment accordingly.

HENRY D. BROOKMAN et al., Appellants, *v.* HENRY T. HAMILL et al., Respondents.

In an action upon a bond, where it appears on the face of the complaint that such bond was void, because taken by a judicial officer in a proceeding of which he had no jurisdiction; the Supreme Court at General Term has power to reverse a judgment for plaintiff, for the error appearing upon the record, although no exceptions were taken upon the trial. (*Vose* v. *Cockroft*, 44 N. Y., 415, distinguished.)

(Argued December 5th, 1871; decided December 12th, 1871.)

Motion for re-argument.

THE action was brought upon a bond given to discharge a vessel from an attachment issued in pursuance of chapter 482, Laws of 1862. The case is reported in 43 N. Y., 552. Motion made upon the ground that under the decision in *Vose* v. *Cockroft* (44 N. Y., 415), the question as to the constitutionality of the law was waived.

E. Terry, for motion.

W. J. Foster, opposed.

Per CURIAM. This case differs from that of *Vose* v. *Cockroft* (44 N. Y., 415), upon which the appellant founds his motion for a re-argument. In that case the objection, that the complaint showed no cause of action, was not taken either at Special or General Term, and the judgment was affirmed at General Term. In the present case, the objection was taken at General Term, and the judgment was there reversed. The defect was incapable of being cured by amendment, it appearing, on the face of the complaint, that the bond sued upon had been taken by a judicial officer in a proceeding of which he had no jurisdiction, and that it was, therefore, absolutely void. We held, that in such a case the court at General Term had power to reverse for the error appearing upon the record. Whether, in the absence of any adjudication upon

the point by the General Term, this court would have taken cognizance of it, was not determined.

We see no ground for ordering a re-argument, and the motion must be denied with ten dollars costs.

All concur. Motion denied.

NOTE.—It will be perceived that the last paragraph of the syllabus of this case as reported in 44 N. Y., 554, goes somewhat beyond the decision. The question as to what would be the action of the Court of Appeals is not determined.—REP.

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MOSES C. GIBSON, Respondent, *v.* ORVILLE H. TOBEY and HERMAN D. BOOTH, Appellants.

Where upon the sale and delivery of goods the vendor receives from the purchaser the note or bill of a third person, the presumption is that the note or bill was accepted in payment, and satisfaction, and the *onus* is upon the vendor to show that it was not thus received.

Plaintiff sold to defendants a number of hogs for cash on delivery. After the delivery was made and amount of purchase-money ascertained, defendant's agent, who made the purchase, stated he would have to go to the bank (some three miles distant) to get the money, and asked plaintiff which he would prefer, the currency or a draft on New York. Plaintiff chose a draft, and consented to the hogs being loaded on the cars, upon the agreement that the draft should be procured as soon as practicable. The draft was procured and accepted by plaintiff without defendants' indorsement. The draft was dishonored. Plaintiff thereupon tendered the draft to defendants and demanded its amount, and upon refusal brought suit.

Held, that there was no waiver of the cash payment by the delivery of the hogs, and the sale was incomplete until the delivery and acceptance of the draft. The presumption of law that the draft was received as payment therefore applied. The action could not be maintained even if it should be held that payment in cash was waived and a credit given, and that the draft was received upon a precedent debt; the facts were conclusive that it was received as payment.

(Submitted November 27th, 1871; decided December 12th, 1871.)

APPEAL from judgment of the General Term of the Supreme Court of the fourth judicial department, affirming

a judgment in favor of plaintiff entered upon the report of a referee.

The action was brought to recover the contract price of a number of hogs alleged to have been sold by plaintiff to defendants.

On the 1st day of November, 1867, at the city of Buffalo, the plaintiff sold and delivered to the defendants a lot of hogs for the sum of $3,408.07, to be paid on delivery. On the delivery of the hogs to them, the defendants' agent sat down and figured up what the hogs came to, and after agreeing upon the amount, told the plaintiff that he would have to go up town and get money to pay for the hogs, and inquired of the plaintiff which he would prefer, the currency or a draft on New York; the plaintiff replied that he would rather have a draft, for he wished to take it home with him; the agent said he would get a draft payable to the plaintiff's order. Defendants' agent asked permission to ship the hogs immediately, which was granted upon the understanding that the draft was to be procured and delivered as soon as possible. The defendants shortly thereafter, and on the same day, procured from Henry J. Shuttleworth, a banker in the city of Buffalo, in good standing, a sight draft for $3,200, bearing date November 1st, 1867, drawn by him upon his bankers in the city of New York, and payable to the order of the plaintiff, and delivered said draft to the plaintiff, and paid the balance of the said price of said hogs in money. There was no agreement that the draft should be taken by the plaintiff at his risk.

The plaintiff resided at Mexico, in the State of Ohio. He left Buffalo on the said first day of November, and reached his place of residence on the evening of the next day, which was Saturday; and on Monday morning, the 4th day of November, 1867, the plaintiff deposited said draft in a bank near his said residence, in which he kept his account; the said bank immediately sent the said draft by mail to New York city for collection; on the 10th day of November, 1867,

the said plaintiff received notice that said draft had been dishonored; the said draft was presented to the drawees for payment on the 6th of November, 1867, and payment refused; on the 4th day of November, 1867, the said Shuttleworth suspended payment, and telegraphed to his bankers in New York city not to pay any drafts drawn by him upon them; at the time of the drawing of said draft said Shuttleworth had funds in the hands of the drawees sufficient to meet the draft. On the 5th day of December, 1867, the plaintiff notified the defendants of the dishonor of the said draft, and subsequently tendered the draft to defendants' agent and demanded the money; this was refused. The plaintiff on the trial offered to surrender the draft to the defendants.

The referee found and decided as matter of law:

1st. That the price of said hogs (to the extent of the amount of said draft beside interest thereon), was unpaid.

2d. That the draft was not a satisfaction of that part of the price of the hogs.

3d. That the plaintiff was entitled to, and he ordered judgment against said defendants for the sum of $3,666.66, and judgment was perfected in accordance therewith.

George B. Hibbard, for appellants. The draft was taken in payment and satisfaction of the price of the hogs. (2 Kent's Com., 497, and cases; *Tyler* v. *Freeman*, 3 Cush., 261; *Adams* v. *O'Connor*, 100 Mass., 575; *Palmer* v. *Hand*, 13 Johns., 433; *Noel* v. *Murray*, 13 N. Y., 167; *Whitbeck* v. *Van Ness*, 11 Johns., 408; *Young* v. *Stahelin*, 34 N. Y., 258; *Reed* v. *Cook*, 15 Johns., 241; *St. John* v. *Purdy*, 1 Sandf., 9; *Strong* v. *Hart*, 6 B. & C., 160, 161; 13 E. C. L., 84; *Frisbie* v. *Larned*, 21 Wend., 450; *Stith* v. *Morehouse* and *Darnell* v. *Morehouse*, unreported, reversing *Darnell* v. *Howard*, 36 How., 511.) The findings, as settled in the case, control. (*Hartman* v. *Proudfit*, 6 Bosw., 191.) Had defendants indorsed draft, it would not be presumed to be received as payment. (*Whitbeck* v. *Van Ness*, 11 Johns., 408, 412; *Breed* v. *Cook*, 15 id., 241.) Failure of plaintiff to give

timely notice of non-payment of draft is fatal to his recovery. (*Smith* v. *Mercer*, Eng. L. R., 3 Exch., 51; *Woodruff* v. *Bennett*, 1 Cow., 711; *Drayton* v. *Hull*, 23 Wend., 345; *Denniston* v. *Inbrie*, 3 Wash. C. C. R., 396; *Coffer* v. *Powell*, Anth. N. P., 68; *Shrimer* v. *Ketler*, 25 Penn., 61.)

P. G. Parker, for respondent. The acceptance of a bill or note of a third party is not payment of a debt, unless by agreement of the parties. (*Noel* v. *Murray*, 3 Kern., 167; *Gibson* v. *Tobey et al.*, 53 Barb., 190; *Darnell* v. *Morehouse*, 36 How. Pr., 511.) The draft was given upon a precedent debt. (*Smith* v. *Lynes et al.*, 1 Seld., 41; *Lupin* v. *Marie*, 6 Wend., 77; *Chapman* v. *Lathrop*, 6 Cow., 110.) Plaintiff not guilty of laches, in not notifying defendants earlier of the dishonor of the draft. (*Bradford* v. *Fox*, 38 N. Y., 289; *Dayton* v. *Trull*, 23 Wend., 345.)

CHURCH, Ch. J. The important question in this case is whether, from the facts found by the referee, his conclusion of law can be sustained. Did the acceptance of the draft by the plaintiff, under the circumstances found, constitute in law a payment for the price of the hogs? If it did, the plaintiff cannot maintain the action; but, if not, the judgment must be affirmed. In determining this question, it is proper to consider, whether the draft is to be deemed delivered and accepted upon the sale and delivery of the hogs, or upon a precedent debt contracted for the purchase of them. The rule differs in the two cases in the application of the presumption of payment. In the former the rule is, that if a vendor of goods receives from the purchaser the note or bill of a third person, such note or bill will be deemed to have been accepted by the vendor, in payment and satisfaction, unless the contrary be expressly proved; and in such a case the *onus* is upon the person receiving the paper. (*Whitbeck* v. *Van Ness*, 11 J. R., 408.) But when such note or bill is received upon a precedent debt, the presumption is that it was not taken in payment, and the *onus* of establish-

ing that it was so received is upon the debtor. (*Noel* v. *Murray*, 13 N. Y., 167.) The sale was for cash, payable on delivery. No credit was asked or intended to be given, but it is claimed that payment was waived by the absolute delivery of the property. It is competent for the seller to waive payment by an unconditional delivery; but the mere fact of delivery does not necessarily establish a waiver. If the seller accompanies the delivery with a declaration of the conditional terms, or if that be the implied understanding of the parties, the sale is conditional. (2 Kent's Com., 497.)

After finding that the sale was for cash, on delivery, the referee finds, that on the delivery of the hogs to them, the defendants sat down and figured up what the hogs came to; and, after agreeing upon the amount, the agent of defendants, who made the purchase, told the plaintiff that he would have to go up town and get the money to pay for the hogs, and inquired of the plaintiff which he would prefer, the currency or a draft on New York, and the plaintiff said he would prefer a draft, as he wished to take it home; and shortly thereafter the agent procured a draft payable to plaintiff's order, and delivered it to him, and that he accepted it without indorsement, but did not agree to receive it at his own risk.

Was this an unconditional delivery? I think not. The plaintiff doubtless reposed sufficient confidence in the defendants' agent to believe that he would go to a bank and procure the draft as agreed; but the idea of giving credit to the defendants for the price of the hogs was not entertained. It does not appear that the plaintiff had any knowledge of the defendants or their responsibility, and nothing was said on the subject. The agent of the defendants desired to ship the hogs on board the cars before he went to the bank, about three miles distant, for the draft. The plaintiff consented that he might do so, but only upon the agreement that the draft was to be immediately obtained. The agent agreed that he would procure either the money or a draft immediately; and the plaintiff consented to the delivery upon the condition that the draft should be procured as soon as practicable. It

would have been no stronger if this condition had been expressed in terms. Delivery and payment were, by the contract, to be simultaneous acts, and were so, in substance. They constituted a single transaction. If payment had not been made, the plaintiff might have retaken his property. The case is distinguishable from those where a credit is given, or the condition of payment is waived by delivery, in the circumstance that the intervening period between the delivery and actual payment was necessary, in order to make the payment as agreed. In such cases the idea of a waiver is repelled. A person purchases an article of merchandise for cash, and, upon receiving it, gives it to a servant to carry away, after which he counts the money and makes payment. Can it be said that a credit is intended, and, if payment is not made, would not the seller have a right to reclaim his property? Where the intervening period is necessary for counting the money, or drawing a note or bill of a third person, or going to a bank to procure funds, or doing any other act for the purpose of completing a contract of sale and delivery according to its terms, such sale and delivery will not be regarded as complete until the payment is made. All preceding acts are deemed conditional upon full performance. Such a rule insures good faith in commercial transactions, and protects the rights of all parties, and does not interfere with the principle, that an unconditional delivery operates as a waiver of payment.

The delivery was accompanied by the understanding plainly implied, if not expressed, that it was made conditional upon payment. The presumption of law that the draft was received as payment therefore applies, and the plaintiff cannot maintain the action. But suppose the other construction is to prevail, and that a credit was given and the draft delivered and received upon a precedent debt, and that it was incumbent upon the defendants to prove that it was received as payment, the result would not be changed. The referee, it is true, finds that the plaintiff did not agree to receive the draft at his own risk; but this only means that there was no express

agreement to that effect, and that the other facts found do not constitute such an agreement. In this I think the referee erred. If there was a debt it existed at the time of the conversation about procuring the draft, and in determining whether there was an agreement to receive the draft in payment. We must take all that was said and done, and the intervening period is unimportant. It was expressed that defendant's agent was to go to the bank for money *to pay* for the hogs. Plaintiff said he preferred a draft, and the agent promised to procure one, payable to plaintiff's own order. It is clear that the draft was to perform the same service as the money; that is, "to pay" for the hogs. The draft was obtained, as agreed, and delivered, and the plaintiff accepted it without indorsement. What sum was necessary to constitute an agreement to receive the draft as payment? Suppose the agent had had the currency and draft when the conversation took place, and he had told the plaintiff "I have the currency and a draft *to pay* for the hogs; which do you prefer?" and the plaintiff had said, "I prefer the draft," and then received it, would he not be deemed to have agreed to receive it in payment as plainly as if the transaction had been formally written out? For the purposes of this question the transaction is the same as if it had all taken place at the same time, and in construing it we must observe the rule applicable to all contracts, that the intent of the parties is to be effectuated. If the plaintiff had not intended to have received the draft in payment he would have said so, or required an indorsement. (*Darnell* v. *Morehouse*, Court of Appeals, not reported.) And when a creditor has an option, to receive money or a note of a third party, and he accepts the latter, it will be presumed that he receives it with the same effect as if he had received the money. (*St. John* v. *Purdy*, 1 Sand., S. C. R., 9.)

At the first trial before the same referee the plaintiff was nonsuited, on the ground that the draft was received as payment, but the judgment was reversed at the General Term of the eighth district. The learned judge who delivered the

Statement of case.

opinion, comments upon various circumstances which appeared in the evidence on the first trial, and which are not found on this trial as facts in the case, and some of which do not appear in the evidence; but it is unnecessary to determine, whether these circumstances should affect the decision. In any view of the case, as now presented, we are of opinion that the judgment must be reversed.

All concur.

Judgment reversed.

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JAMES H. FISHER, Administrator, etc., Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

The B. and N. F. R. R. Co. and the B. and L. R. R. Co., both of whose lines run through the village of Tonawanda to the city of Buffalo, entered into an agreement, by which the right of way on the line adopted by the B. and L. R. R. Co. was to be procured, and the grading, etc., to be done at joint expense, each company to lay one track at its own expense. The B. and L. R. R. Co. was engaged in constructing its track, when it was consolidated with other companies into the N. Y. C. R. R. Co., which latter company completed the track and ran its trains over it from Lockport to Buffalo. The B. and N. F. R. R. Co. never laid any track upon the line acquired under the agreement. The N. Y. C. R. R. Co. entered into an agreement with the B. and N. F. R. R. Co., by the terms of which it acquired the right to use the road, property and franchises of the latter during its corporate existence. By its charter the latter company was authorized to charge four cents a mile for transporting passengers. Subsequently under the provisions of chapter 302, Laws of 1855, the N. Y. C. R. R. Co. acquired all the stock of the B. and N. F. R. R. Co., and filed the required certificate with the Secretary of State.—*Held*, that the contract between the N. Y. C. and the B. and N. F. R. R. Cos. was valid. By it the former became the lessee of the latter within the meaning of the statute of 1855, and by a compliance with the provisions of that statute, became vested with all the property and franchises of the latter, including the right to charge four cents a mile over its track, but that this right did not extend to the track constructed by the B. and L. R. R. Co., or by the N. Y. C. R. R. Co., its successor.

Under the provisions of the act of 1857, to prevent extortion by railroad companies (chap. 185, Laws of 1857), only one penalty of fifty dollars,

Statement of case.

together with the excess of fare, can be recovered for all acts committed prior to the commencement of the action. The forfeiture is not given as a satisfaction for the injury received. That is fully satisfied by a return of the sum extorted with interest; but it is given to compensate the party injured for his expenses in the prosecution, and to compel the payment of such a sum by the company violating the law as would effectually stop the practice.

A recovery can be had under this act by a party who has paid the excessive fare when riding, simply for the purpose of obtaining the penalty. (PECKHAM, J., dissenting.)

(Argued December 6, 1871; decided December 12, 1871.)

APPEAL from judgment of the General Term of the Superior Court of Buffalo, affirming a judgment in favor of plaintiff, entered upon a decision of the court at Trial Term.

This action is brought to recover penalties alleged to have been incurred by defendant, under the provisions of chapter 145, Laws of 1857, in asking and receiving a greater rate of fare than allowed by law from the plaintiff's intestate.

Under an act of the legislature of this State, passed May 3, 1834 (Laws of 1834, chap. 269, page 472), the Buffalo and Niagara Falls Railroad Company was incorporated, with power to construct, maintain and operate a railroad from Buffalo to Niagara Falls, through the village of Tonawanda, and to ask and receive not to exceed four cents a mile for the carriage of any passenger.

That corporation constructed a railroad accordingly, laying its track almost entirely in the public highways and streets, and operated it until December, 1853.

In 1852 the Buffalo and Lockport Railroad Company was incorporated, under the general railroad act, with power to construct, maintain and operate a railroad between Buffalo and Lockport, through the village of Tonawanda.

It located its railroad accordingly, acquired the right of way, and had constructed its road from Lockport to Tonawanda, and had "acquired title to its line of road between Tonawanda and Buffalo, except 2,000 feet, and commenced the construction of its road."

With the exception of 2,000 feet at Tonawanda, the line

of the Buffalo and Lockport Railroad Company's road was entirely new, separate and distinct from that of the Buffalo and Niagara Falls Railroad Company, and those companies' roads had different termini in the city of Buffalo.

On June 7th, 1852, the Buffalo and Lockport Railroad Company entered into a written agreement with the Buffalo and Niagara Falls Railroad Company, by which it was agreed, in substance, that the former company should acquire title in its name to the right of way on its projected line of road, between Tonawanda and Buffalo, the expense of which, and of the erection of depots and the other necessary buildings to be borne jointly by both companies. And it was expressly agreed that each company should pay "the expense of superstructure of one track."

Pursuant to an act of April 2d, 1853, entitled "An act to authorize the consolidation of certain railroad companies" (Laws of 1853, chap. 76, p. 110), the Buffalo and Lockport Railroad Company became, on July 7, 1853, consolidated with all of the other railroad companies mentioned in the first section of that act, under the name of "The New York Central Railroad Company."

On December 22d, 1853, an agreement was entered into between the New York Central Railroad Company, the Buffalo and Niagara Falls Railroad Company and the Lewiston Railroad Company, in and by which the Buffalo and Niagara Falls Railroad Company leased to the New York Central Railroad Company, its entire property and franchises for the full and unexpired term of its corporate existence.

The New York Central Railroad Company completed the construction of the road located by the Buffalo and Lockport Railroad Company, and the erection of its depots, about December 1st, 1854.

So much of the right of way as had been acquired by the Buffalo and Lockport Railroad Company, between Tonawanda and Buffalo, up to December 22d, 1853, was paid for jointly by that company and the Buffalo and Niagara Falls Railroad Company. The New York Central Railroad Com-

pany subsequently acquired the remaining portion of such right of way and took the title thereto, in the name of the Buffalo and Lockport Railroad Company.

But a single track has ever been laid down on the Buffalo and Lockport Railroad Company's road between Buffalo and Tonawanda.

As soon as this track was completed, the New York Central Railroad Company took up and abandoned the track and road of the Buffalo and Niagara Falls Railroad Company between Buffalo and Tonawanda; and since that time all trains of cars run between Buffalo and Tonawanda, whether destined for Lockport or Niagara Falls, have been run over and upon this track.

Subsequent to the passage of the act in relation to railroads held under lease (chapter 302, Laws of 1855), the New York Central Railroad Company took a surrender, or transfer, of all of the capital stock of the Buffalo and Niagara Falls Railroad Company, and on April 23, 1869, filed the certificate, provided for therein, with the Secretary of State.

On November 1st, 1869, under chapter 917, of the Laws of 1869 (vol. 2, page 2,399), the New York Central Railroad Company and the Hudson River Railroad Company were consolidated, and a new corporation created under the name of the New York Central and Hudson River Railroad Company, the defendant in this action.

It is provided by section 3 of that act, that "nothing in this act contained shall allow any rate of fare for way passengers greater than two cents per mile, to be charged or taken over the track or tracks of that railroad now known as the New York Central Railroad Company; and the rate of fare for way passengers over the track or tracks now operated by the said New York Central Railroad Company, shall continue to be two cents per mile and no more, wherever it is now restricted to that rate of fare."

The actual distance from the defendant's depot at Erie street, in Buffalo, to its depot at Tonawanda, does not exceed

ten and a half miles; and from Erie street depot to Lockport does not exceed twenty-six miles.

The legal rate of fare at two cents a mile from Buffalo to Tonawanda is twenty-three cents; and from Buffalo to Lockport, fifty-two cents; while the amount uniformly "asked and received" by the New York Central Railroad Company and by the defendant was, and is, from Buffalo to Tonawanda, thirty-four cents; and from Buffalo to Lockport, sixty-five cents.

During the time alleged in the complaint and up to November 1st, 1869, the New York Central Railroad Company ran two trains daily (Sundays excepted), from Buffalo to Lockport and return, which trains were known as "Buffalo and Lockport trains," and several trains daily between Buffalo and Niagara Falls and return, known as "Buffalo and Niagara Falls trains;" and since November 1st, 1869, the defendant has, in like manner, run trains between those points.

The court found as a fact, "that on the 23d day of April, 1869, all of the franchises and property of the Buffalo and Niagara Falls Railroad Company became vested in the New York Central Railroad Company."

"That from December, 1853, to November, 1869, the New York Central railroad Company and the defendant since then have, in the exercise of the franchises acquired from the Buffalo and Niagara Falls Railroad Company, run its trains between Buffalo and Niagara Falls; and in the exercise of the franchises acquired from the Buffalo and Lockport Railroad Company, under the act of 1853, run its trains between Buffalo and Lockport."

"That the plaintiff took passage as a way passenger on such trains run between Buffalo and Lockport, from Buffalo to Tonawanda, and the defendant asked and received from him, and the plaintiff paid thirty-four cents fare on each of twenty-six different passages."

"And, as matter of law, the court decided that the defendant, on each and every of such occasions asked and received from the plaintiff a greater rate of fare than that allowed by

law, and thereby forfeited fifty dollars upon each and every of said occasions; and that the plaintiff is entitled to recover the same, together with the excess of fare so received by the defendant."

Judgment was accordingly entered for $1,376.48, damages and costs.

A. P. Lansing, for appellant. The statute to prevent extortion by railway companies is penal, and must receive a strict construction. (*Sprague* v. *Birdsall*, 2 Cow., 419; *Seward* v. *Beach*, 29 Bar.; *Hasbrook* v. *Paddock*, 1 Bar., 635.) Every material fact must be strictly proved. (*B. and W. P. R. R. Co.* v. *Robbins*, 22 Bar., 662; *Rathbun* v. *Acker*, 18 Bar., 393; *Willard* v. *L. A. and A. R. R. Co.*, 9 How., 238; *McClosky* v. *Cromwell*, 11 N. Y., 593; *Chase* v. *N. Y. C. R. R. Co.*, 26 N. Y., 525.) It is in nature of, and for the purpose of satisfaction for the wrong done. (*Palmer* v. *Conly*, 4 Den., 374; *Sturges* v. *Spofford*, Ct. of Appeals.) The payment of excess of fare was voluntary, passages being taken for the purpose of recovering penalty, and the court will not aid a party in *pari delicto*. (*People* v. *Wholey*, 6 Cow., 661; *Nellis* v. *Clark*, 20 Wend., 32; *Nellis* v. *Clark*, 4 Hill, 426.) The recovery under this statute is limited to fifty dollars and excess of fare paid. (*Washburn* v. *McInay*, 7 J. R., 134; *Tiffany* v. *Driggs*, 13 J. R., 253; *Bigelow* v. *Johnson*, 13 John., 428; *Deo* v. *Reed*, 3 Hill, 527; *People* v. *N. Y. C. R. R. Co.*, 13 N. Y., 78.) Defendant acquired all the rights of franchise of the B. and N. F. R. R. Co. (*Robertson* v. *City of Rockford*, 21 Ill., 457; *Clearwater* v. *Meredeth*, 16 Ind., 172; 1 Wall., 125.)

G. W. Cothran, for respondent. Defendant is bound to exercise all its franchises. (*People* v. *A. and V. R. R. Co.*, 22 N. Y., 261.) The two cent limitation of the act of 1853, not repealed by implication by the act of 1855. There must be a total repugnancy to work that result. (*Wood* v. *U. S.*, 16 Peters, 342; *Bower* v. *Lean*, 5 Hill, 225; *Dariess* v.

Fairburn, 3 How., 636; *McCool* v. *Smith*, 1 Black., 429; *Wallace* v. *Bassett*, 41 Barb., 92; Dwarris on Stat., 532.) The lease by the B. and N. F. R. R. Co. was void. (2 Kent's Com., 299, and cases cited; *A. and C. R. R. Co.* v. *Douglas*, 9 N. Y., 444; *Curtis* v. *Leavitt*, 15 N. Y., 9, 212; *People* v. *U. Ins. Co.*, 15 John., 358; *Burns* v. *Ontario Bank*, 19 N. Y., 152, 163; *Halstead* v. *Mayor, etc.*, 3 N. Y., 430; *S. and B. R.* v. *L. and N. W. R.*, 6 Ho. L. C., 113, 131, 186; *Winch* v. *B. L. and C. R.*, 5 De. G. & S., 562; *Bernan* v. *Rufford*, 1 Sim. U. S., 550; *G. N. R. Co.* v. *E. C. R.*, 9 Hare, 306; *E. A. R. Co.* v. *E. C. R. Co.*, 11 C. B., 2 J. Scott, 775; *Bissell* v. *M. S. and N. I. R. R. Co.*, 22 N. Y., 258; *Johnson* v. *S. and B. R.*, 3 De. G. & M., 914; *L. B. and S. C. R.* v. *L. and S. W. R.*, 4 De. G. & J., 362; *A. and M. R.* v. *I. and C. R.*, 5 Am. Law Reg., U. S., 733; *Troy and R. R. R.* v. *Kerr*, 17 Bar., 581, 601; *MacGregor* v. *The O. M. of D. R. R.*, 16 Eng. L. & Eq., 180; *Pearce* v. *M. and I. R. Co.*, 21 How., U. S., 441; *Langley* v. *B. and M. R. R.*, 10 Gray, 103; *Commonwealth* v. *Smith*, 10 Allen, 448; *McClure* v. *M. and L. R. R.*, 13 Gray, 124; *Susquehanna Coal Co.* v. *Bonham*, 9 W. & S. 27; *Arthur* v. *C. and R. Bank*, 9 Sund & M., 394; *S. G. R* v. *G. N. R. Co.* 18 Eng. L. & Eq., 512; *Simpson* v. *Denison*, 10 Hare, 51.) Plaintiff entitled to recover the fifty dollars forfeiture for each offence. (*Palmer* v. *Conly*, 4 Den., 374; 2 N. Y., 182; *Deyo* v. *Rood*, 3 Hill, 527; *Valland* v. *King*, 3 Barb., 548; *Johnson* v. *H. R. R. Co.*, 2 Sweeney, 298; 1 Kent's Com., 465; *Bove* v. *Booth*, 2 W. Black, 1226; *Ward* v. *Snell*, 1 H. Black, 10, 13; *Moore* v. *Jones*, 23 Vermt., 735.) Any number of penalties may be counted upon and recovered in the same action. (*Bartolett* v. *Achey*, 38 Penn. St. R., 273; *Deyo* v. *Rood*, 3 Hill, 527; *City of Brooklyn* v. *Cleves*, Lalor's Sup. to H. & Den., 231; *Gibson* v. *Sault*, 33 Penn. St. R., 44; *People* v. *New York Central R. R. Co.*, 25 Barb., 199, S. C., affirmed in Court of Appeals; 13 N. Y., 78; *Hill* v. *Herbert*, N. J., 924; *Barkhamsted* v. *Parsons*, 3 Conn.; *Dallas* v. *Hendry*, 2 Penn., N. J. (973), 707; *Peo-*

ple v. *McFadden*, 13 Wend., 396; *City of Brooklyn* v. *Tonybee*, 31 Barb., 282; *Howland* v. *Bothmar*, 4 T. R., 228; *Young* v. *The King*, 3 T. R., 98; *Foster's Case*, 11 Coke, 56; *Parker* v. *Sir J. Curson*, Cro. Jac., 529; *Dorner* v. *Smith*, Cro. Eliz, 835; Espinasse Penal Statutes, 123, 145, 146; 1 Cow. Treatise, 2d ed., 561; *Johnson* v. *Hudson River R. R. Co.*, 2 Sweeney, 298; *Vallance* v. *King*, 3 Barb., 548; *Langdon* v. *The Fire Department of New York*, 17 Wend., 234; *Chicago and Alton R. R. Co.* v. *Howard*, 38 Ill. R., 414; *Young* v. *The King*, 3 T. R., 98; *Howland* v. *Bothmar*, 4 T. R., 228; *Kane* v. *The People*, 8 Wend., 235; 2 Archibald Crim. Plead (Banks & Bro., 7th ed.), 92 Marg.) The only question is, did defendant violate the law? If so, it must suffer the consequence. (*Commonwealth* v. *Hallelo*, 103 Mass., 452; *Detely* v. *Yeoman*, 39 Miss., 475.) The fact that plaintiff traveled to recover the penalty, is no defence. (*Com. of Excise* v. *Backus*, 29 How., 33; *Tracy* v. *Talmadge*, 14 N. Y., 162; *Mount* v. *Waite*, 7 John., 434; *Meech* v. *Stone*, 19 N. Y., 26.)

GROVER, J. In 1852, the Buffalo and Lockport Railroad Company became a corporation under the provisions of the general railroad law, for the purpose of constructing and operating a railroad for the transportation of persons and property between these places, which road should pass through the village of Tonawanda, a place situate ten and a-half miles north of Buffalo.

The corporation commenced the construction of its road, and had completed the same from Lockport to Tonawanda, and under a contract with the Buffalo and Niagara Falls Railroad Company, was engaged in the construction of a track for its use between Tonawanda and Buffalo, on the 7th of July, 1853, when it became consolidated with certain other companies, pursuant to the act of April 2d, 1853, into a new corporation, under the name of the New York Central Railroad Company. At the time of this consolidation, and for some time previous thereto, the Buffalo and Niagara Falls

company were operating a railroad between the city of Buffalo and the village of Tonawanda, the latter being a station on its road from Buffalo to Niagara Falls. After the consolidation, the New York Central Company completed the track from Tonawanda to Buffalo, over which it ran trains from Lockport to Buffalo. These facts show clearly that that part of the road between Tonawanda and Buffalo was subject to the seventh section of the consolidation act, which provides that when two or more of the railroad companies named in the act become consolidated under its provisions, said consolidated company shall carry way passengers on its road at a rate not exceeding two cents per mile, unless relieved therefrom by the facts hereafter stated:

On the 7th of June, 1852, the Buffalo and Lockport, and the Buffalo and Niagara Falls companies entered into an agreement, by which the right of way on the line adopted by the Buffalo and Lockport company (substantially between Tonawanda and Buffalo) was to be procured at the joint expense of both companies, to be held and enjoyed by both companies jointly, for their joint and separate business, and that the grading, masonry and bridges were to be constructed at the joint expense of both companies, such grading, etc., to be of sufficient width for two tracks, said companies each to pay for itself the expense of the superstruction of one track. This plainly contemplated that while the right of way was to be acquired at the joint expense of both companies, and the expense of grading, etc., paid in like manner, yet each company was to lay its own track thereon at its own expense, if it chose to avail itself of its right so to do. The Buffalo and Niagara Falls Company never laid any track upon the line acquired under this agreement. On the 23d day of December, 1853, the New York Central Company entered into an agreement with the Buffalo and Niagara Falls Company by which (if valid) the former acquired from the latter the right to use the road and property connected therewith, and its franchises during the existence of the latter corporation. The validity of this contract is claimed by vir-

tue of the act authorizing railroad companies to contract with each other. (Laws of 1839, 195.) That act contains but a single section, providing that it shall be lawful hereafter, for any railroad corporation to contract with any other railroad corporation, for the use of their respective roads, and thereafter to use the same in such manner as may be prescribed in such contract, but that nothing in the act contained shall authorize the road of any railroad corporation to be used in a manner inconsistent with the provisions of the charter of the corporation, whose railroad is to be used under such contract. I think the contract made was within the powers conferred by this act, and therefore valid, and that under this contract the Central Company, acquired the right to run cars upon the road theretofore in use by the Niagara Falls Company, under the franchise of the latter company, which authorizes a charge of four cents a mile for transporting passengers, irrespective of the question whether such passengers were way or through, but the plaintiff was not carried upon any such road, but upon the track constructed by the Buffalo and Lockport Company, or its successor, the New York Central. In 1855, an act was passed (Laws of 1855, 517), providing that any railroad corporation then being the lessee of the road of any other railroad corporation, might acquire the stock of such corporation in the manner therein provided, and that when it had so acquired the majority of such stock, its directors might, by resolution, to be entered on their minutes, become *ex officio*, the directors of the corporation whose road was held under lease, and further providing, that when the whole stock had been so acquired, the estate property, rights, privileges, and franchises of the said corporation, whose stock had been thus acquired, should thereupon vest in, and be held, and enjoyed by the corporation so acquiring such stock, as fully and entirely, and without change or diminution, as the same were before held and enjoyed, and be managed and controlled by the board of directors of the said corporation which has so acquired such stock, and in the corporate name of such corporation. There

can be no doubt but that the New York Central was the lessee of the Buffalo and Niagara Falls road, within the meaning of this statute. The case shows that the New York Central company, after the passage of this act, and before April 23d, 1869, acquired in the manner therein provided, all the stock of the Buffalo and Niagara Falls Railroad Company, and on that day filed the requisite certificate in the office of the Secretary of State, and thereby become invested with all the property and franchises of that company. From these facts the defendant claims the right to charge for the carriage of passengers between Buffalo and Tonawanda four cents per mile. If right in this, the judgment for the plaintiff should be wholly reversed, as the sum charged the plaintiff was less than this amount. The argument of the defendant is this: The Buffalo and Niagara Falls Railroad Company had the franchise of carrying persons by rail from Buffalo to Tonawanda, and to charge and receive therefor four cents per mile. That by compliance with the provisions of the act of 1855, it has acquired all the franchises of that company, in as full and ample a manner as such franchises were enjoyed by it. That, therefore, the defendant has the right to carry passengers by rail between those points, and charge the like sum per mile therefor. It is this view that induced the defendant upon the evidence of its counsel to fix the fare between those points at a greater rate than two cents per mile. But this entirely overlooks the fact, that the Buffalo and Niagara Falls Company never had the right to transport passengers upon the track of the defendant, and charge therefor more than two cents per mile, and never could have acquired any such right. The act of 1839 expressly prohibits the lessee of any railroad from exercising any franchise, upon the road leased, inconsistent with the charter of the lessor. Had the Buffalo and Niagara Falls road leased from the New York Central its road between Tonawanda and Buffalo, and the franchise connected therewith, it would have been obliged to carry passengers thereon for two cents per mile, for the reason that

a greater charge would have been inconsistent with the charter of the New York Central.

It is upon this track the plaintiff was carried by the defendant. Upon this track the defendant was, before and at the time it acquired the property and franchises of the Buffalo and Niagara Falls Railroad Company, obliged to carry passengers for two cents a mile. It was not relieved from its obligation so to carry them, by acquiring the franchise of the Buffalo and Niagara Falls Company to carry upon another track between the same points, and charge therefor a higher rate per mile. Whether there is, or has been since the removal of the old Buffalo and Niagara Falls road by the defendant, any track in existence between Buffalo and Tonawanda, upon which the defendant can charge more than two cents per mile, although the passenger may be going to Niagara Falls as held by the General Term, is a question of grave doubt, but one not necessary to decide in the present case. It follows that the plaintiff was entitled to judgment under the act to prevent extortion by railroad companies. (Laws of 1857, 432.) That act (section 1) provides, that any railroad company which shall ask and receive a greater rate of fare than that allowed by law, shall forfeit fifty dollars, which sum may be recovered, together with the excess so received, by the party paying the same; but that it shall be lawful, and not construed as extortion, for any railroad company, to take the legal rate of fare for one mile for any fractional distance less than a mile. The defendant insists that but one penalty can be recovered in the action. First, for the reason, that by the fair construction of the act, no person can acquire a right to recover more, for any and all violations previous to the commencement of the action. Second, that but one penalty can be recovered in an action, in the absence of a statute conferring the right to recover more.

It is clear that the excess exacted, if not voluntarily paid, could be recovered without the statute. That provides, also, for its recovery, and, doubtless, the whole amount of excess, paid by any person to the company within the period fixed

by the statute of limitations, may be recovered in one action. The question arises upon the fifty dollars, which the statute provides that the company shall forfeit by asking and receiving a greater rate of fare that that allowed by law, which sum may be recovered, together with the excess so received, by the party paying the same. How recovered? The law answers, by suit in any court having jurisdiction. What may be recovered? The statute answers, the fifty dollars forfeited, which sum, together with the excess paid. It is clear that the letter of the statute authorizes the recovery of nothing more.

The counsel for the respondent insists that, as soon as the excess of fare was charged and received, the right of action, by the person paying it, for its recovery, and also of the sum of fifty dollars, forfeited, was perfect.

In this the counsel is correct. He further insists that it follows, that a repetition of the act by the defendant, gives him an additional right of the same character; but that is quite a different question, which must be determined by the construction of the statute. In this connection the counsel cites *Palmer* v. *Conly* (4 Denio, 374). That was an action against several persons, to recover the penalty given by section 17, 2 Revised Statutes, p. 503, for knowingly assisting the plaintiff's tenant to remove his goods from the demised premises, having rent due thereon, for the purpose of avoiding the payment of the rent; and the question was, whether the statute abolishing distress for rent, passed during the pendency of the action, was a bar to its further prosecution. Held, that it was not, for the plain reason that the statute abolishing distress for rent, although rendering the section, giving the penalty, inoperative for the future, because no case could occur rendering its violation possible, yet it did not repeal the section. It is from the opinion in this case, and of that of the learned judge when the same case was before this court upon appeal (2 Comst., 182), that the counsel cites, to show that the right to the penalty was one vested in the plaintiff. That this is not true, in the sense insisted upon by the counsel, is shown

by the fact that the right would be destroyed by a repeal of the statute giving the penalty, as is shown by note *b* of the reporter, at page 377. A further question arose, which was, whether, several persons having been concerned in the removal, a several penalty had been incurred by each, or a single penalty, which might be recovered severally against any one or against all jointly. The court held that but a single penalty had been incurred, although the language of the statute was "every person," etc., apparently making each liable to a several penalty, upon the ground that such was the apparent intent, for the reasons that the offence was single, and given to the plaintiff in satisfaction of the injury received by him. It is insisted by the counsel that this forfeiture is given to the party as a satisfaction for the injury received. But that injury is fully satisfied, in judgment of law, by returning to the party the sum extorted, with interest thereon. That is the satisfaction given for such an injury by the common-law, in the absence of any statute; and when, in such cases, punitory damages, sometimes called smart-money, are given, it is not to compensate the plaintiff for his injury, but to punish the defendant for his misconduct. A little reflection will show, I think, what the forfeiture was given for. Until 1855, so far as I am aware, no statute had been passed upon this subject. Experience had shown that railroad corporations were charging fares beyond the rate allowed by law; that these charges were very small in each particular case, but, aggregated for a year, amounted to a sum sufficient to continue the practice. The sums so extorted were always small in any one case, usually but a few cents, sometimes shillings, and the trouble and expense of prosecuting for their recovery in justices' courts were more than the amount received from any one person. Thus the illegal practice was continued with impunity.

To remedy this, the statute was passed giving the fifty dollars to the party paying the money, not as a satisfaction for the injury received, for that was otherwise compensated; but to enable him to prosecute in a court of record, when

he could recover the compensation of his attorney as costs, and to compensate for any further expense that might be incurred in the suit, and to compel the payment of such a sum by the defendant as would effectually stop the practice. To effectuate this intent, the language of the statute was chosen with care; which sum, etc., may be recovered, omiting the words, "for each and every offence," found in various penal statutes, showing clearly that the legislature did not intend to open a door to a practice adopted in a case originating in another part of the State, now under advisement in this court, of opening a book account of penalties earned, and delaying suit for a year, when such penalties amounted to between $20,000 and $30,000. A construction permitting this would defeat the intention of the legislature, which was to suppress the extortion by prompt prosecutions, by enabling parties to forbear suing until the aggregate of penalties amounted to a large sum, and induce others to do as one of the plaintiffs in one of the cases now in judgment was honest enough to testify he did; that was to abandon other business and spend his time for a considerable period in riding back and forth from Tonawanda to Buffalo for the purpose of earning penalties. This answers the suggestion of counsel, that if but one penalty can be recovered in this case, a party can be convicted but of one crime, though guilty of several, by showing from the language used, construed in the light of the facts known to the legislature, that it was the design of the statute, that but one forfeiture should be recovered for all acts committed prior to the commencement of the action. The counsel cites *Deyo* v. *Rood* (3 Hill, 527), which was an action for the recovery of penalties incurred by violations of the excise act, by selling strong or spirituous liquors without a license. The language of the statute is, whoever shall sell strong or spirituous liquors, etc., without having a license, etc., shall forfeit twenty-five dollars. Held, that a penalty was incurred by each sale, and that all incurred might be recovered in one suit; but a subsequent section of the same act provided, that the penalties given by the act

might be recovered by the overseers of the poor; thus showing that the legislature designed to impose a penalty and provide for its recovery for every offence. See *Washburn* v. *McInroy* (7 J. R., 134), where it was held, in a similar action, that under the statute, as then in force, but one penalty could be recovered, for the reason that from the entire act such appeared to be the intention of the law maker. These cases, and *Bones* v. *Booth* (2 Wm. Blackstone, 1226), *Ward* v. *Snell* (1 H. Blackstone, 10), and other cases and authorities cited by counsel, show that the statute in question is to be fairly construed, whether regarded as penal, or remedial so as to carry into effect the intention of the makers, apparent from the language used. (See, also, *Chapman* v. *Chapman*, 1 Root, 52; *Barber* v. *Eno*, 2 Root, 150; *Garett* v. *Messenger*, 2 Law Reports, Eng. Com. Pleas, 583; *Tiffany* v. *Driggs*, 13 J. R., 253; *Sturgess* v. *Spoffard*, decided by this court, not reported.)

My conclusion is, that but one penalty can be recovered upon the statute under consideration, for all acts committed prior to the commencement of the action. If, after this, it is again violated, another may be recovered in another action commenced thereafter, and so on, as long as violations continue. This will not only tend to put a stop at once to the extortion, when it is committed knowingly by the defendant, but where it is done under a mistake as to its rights, will give it notice that its right to charge the amount claimed is challenged, and will induce a cautious examination of the question, and an abandonment of the claim before a ruinous amount of penalties have been incurred. The idea that a liability to a penalty of fifty dollars with costs of suit will be insufficient to restrain railroad corporations, is too evidently groundless to require consideration; but even if sound, the legislature, and not the courts, must apply the remedy. This makes it unnecessary to determine, whether if several penalties are recoverable, they can all be recovered in one action, or whether a separate action must be brought for each penalty. I dismiss this part of the case with the simple remark

that irrespective of what was the early common-law rule, or how the question as an original one should be determined upon principle, the rule has been too long considered, settled and acted upon in this State, that they can all be recovered in one action, to permit any departure from it by this court. A point was made by the counsel for the appellant, that a recovery could not be had by a party who paid the excessive fare, when riding for the purpose of obtaining a penalty. In this I cannot concur. The forfeiture is imposed upon the company for its act, and this entirely irrespective of the object or motive of the passenger in traveling.

This leads to a modification of all the judgments, by reducing the recovery in each case to one penalty and the excess paid. This makes the question of costs discretionary with the court. While the general rule is, that when it is found that the judgment is materially erroneous to the prejudice of the appellant, for the correction of which he is obliged to come into this court, to charge the respondent with costs of this court, yet I think they should not be so charged in these cases. The character of the litigation leads me to the conclusion that neither party should recover the costs of this court against the other.

Ch. J., ALLEN and FOLGER, JJ., concur.

PECKHAM, J., dissents from so much of the opinion and decision, as allows a party buying tickets for the purpose of suing for a penalty, to recover.

RAPALLO, J., not voting; being interested in the question as counsel.

Judgment accordingly.

ENOS RICHARDSON, Appellant, *v.* GEORGE CARPENTER, Respondent.

Defendant had in his hands for collection a claim, one-half of the proceeds of which he had agreed to pay plaintiff. One M. drew an order upon defendant, requesting him to pay plaintiff $500 out of the other half when collected, which order defendant accepted, and upon the acceptance

Statement of case.

plaintiff paid to M. the amount of the order. Defendant collected upon the claim $1,050.

Held, that the acceptance of the order was an admission by defendant, that the moiety of the collection not agreed to be paid to plaintiff belonged to M., and was an undertaking to pay such moiety to plaintiff, not exceeding $500.

(Argued December 4, 1871; decided December 12, 1871.)

APPEAL from order of the General Term of the Superior Court setting aside judgment entered on report of referee, and granting a new trial.

The action was brought on the following order:

"NEW YORK, *February* 14, 1868.

"Mr. G. Carpenter, 13 Chambers street.—Please pay E. Richardson, Esq., or order, $500 for value received, besides the amount stipulated to pay Mr. R. out of the proceeds of the claim against the Peabody estate, now in your hands to collect, when the same shall have been collected by you.

"Respectfully yours,

"H. B. MELVILLE."

This order was accepted by defendant February 24, 1868, and upon the acceptance the plaintiff advanced to Melville the amount mentioned in the order.

The answer admitted the order and acceptance, and that the net proceeds of the claim referred to was $1,050. The answer further alleged that defendant was induced to accept the order by the false representations of Melville as to amount of claim, and also contained the following statement: "And defendant says the plaintiff well knew the circumstances under which said draft was accepted, and that in the whole matter he acted in concert with the said Melville to obtain from said defendant the whole amount of said money so collected on said judgment for the benefit of the said Melville and himself, and to deprive this defendant from applying same so received toward the payment of the large indebtedness of the said Melville to said defendant."

That one-half, $525, defendant paid to plaintiff under the agreement.

Statement of case.

Plaintiff had been a partner in the firm of Palmer, Richardson & Co. Said firm had a judgment against David and Henry B. Melville, recovered in June, 1854, for $2,809.68. David lived in Texas, and Henry B. Melville in New York. A judgment has been recovered by Melville & Co., in Texas, against one Peabody's estate, and the money was in the Probate Court, at Brownsville, Texas. Henry B. Melville was a client of the defendant in this action, and gave him the information; also, that Richardson did not want to go to any expense, and would give defendant one-half that he collected if he would undertake it. Carpenter called on Richardson, made the agreement, obtained an absolute assignment of the judgment to him, and defendant gave back to plaintiff an agreement to pay him one-half of the net proceeds collected. This agreement is dated August 24, 1866.

In September, 1868, the defendant received $1,050 as net proceeds, and paid plaintiff one-half, viz., $525. About three-quarters of an hour subsequently, plaintiff presented the draft for payment. Defendant then repudiated it as without consideration, and obtained by fraud. At the close of plaintiff's evidence defendant's counsel moved to dismiss the complaint, on the ground—

1st. That there is no evidence that there were any funds in the hands of defendant applicable to the payment of this draft.

2d. It is not proved that the defendant had collected any money from the Peabody estate belonging to Melville, the drawer of the draft, or to which he was in any way entitled.

3d. That there is no evidence of consideration for the draft, but on the contrary it appears there was no consideration.

The motion was denied, and defendent excepted.

Further facts appear in the opinion.

The referee found in favor of the plaintiff for the amount of the order and interest.

Thomas H. Hubbard, for appellant. The words, "for value received," *prima facie* evidence of consideration. (*Walrad*

v. *Petrie*, 4 Wend., 575; *Jerome* v. *Whiting*, 7 Johns., 321; Edwards on Bills, 169, 421; *Grant* v. *Morse*, 22 N. Y., 323.) The judgment should have been permitted to stand, even if there had been no finding that there was a consideration. (*Viele* v. *The Troy and Boston R. R. Co.*, 20 N. Y., 184, 186; *Otis* v. *Spencer*, 16 id., 610.) The General Term may make any reasonable inference from the evidence to support the decision of the referee. (*Grant* v. *Morse*, 22 N. Y., 323; *Spencer* v. *Ballou*, 18 id., 327, 333.) Defendant is estopped from denying his promise, or setting up want of consideration. (*Kemble* v. *Lull*, 3 McLean, 272; Wendell's Blackstone, vol. 2, p. 445, note 12, and cases there cited; Kent's Com., vol. 2, p. 465.) Defendant's acceptance an equitable appropriation of the fund for the purposes mentioned in the order. (*Vreeland* v. *Blunt*, 6 Barb., 182.)

D. T. Walden, for respondent. The draft was not a bill of exchange. (*Atkinson* v. *Manks*, 1 Cow., 692, 707; *Cook* v. *Satterlee*, 6 id., 108; *Worden* v. *Dodge*, 4 Denio, 159; *Lowery* v. *Stevens*, 3 Bosw., 505; Story on Bills, § 46.) It was necessary to show consideration between Melville and defendant. (*Atkinson* v. *Manks*, 1 Cow., 692, 707; *Ford* v. *Adams*, 2 Barb., 349.) The referee's conclusions of law are not sustained by his findings of fact. (*Manly* v. *Ins. Co. of N. A.*, 1 Lansing, 24; *Smith* v. *Devlin*, 23 N. Y., 365, per MASON, J.; *Buckingham* v. *Payne*, 36 Barb., 81, 87; *Armstrong* v. *Bicknell*, 2 Lansing, 217, 221; *Voorhis* v. *Voorhis*, 50 Barb., 119, 124.) The sole question here is, whether the court below erred, as matter of law, in its decision on defendant's exceptions, and in setting aside the referee's report. (Code, §§ 268, 272; *Rice* v. *Isham*, 1 Keyes, 46; *Bush* v. *Lee*, 36 N. Y., 49; *Thompson* v. *Meuck*, 2 Keyes, 82; *Baldwin* v. *Van Durze*, 37 N. Y., 487; *Case* v. *Philips*, 39 id., 164.) The order was *nudum pactum*. (Edwards on Bills, 171; Story on Bills, § 63; *Grant* v. *Da Costa*, 3 Maule & S., 351, per Lord ELLENBOROUGH; *Cox* v. *Scade*, 3 Denio, 8.) The language of the instrument did not estop defendant from

denying his obligation on the acceptance. (*Clark* v. *Sissons*, 22 N. Y., 312, 316; *Hutchins* v. *Hebbard*, 34 id., 24, 27.)

GROVER, J. The money was payable out of a particular fund. It was not, therefore, a draft, within the law-merchant; and the mere acceptance did not, of itself, create a presumption of a sufficient consideration. The fair import of the words, "for value received," contained therein, is, that such value had been received by the drawer, and not by the acceptor. The order drawn by Melville upon the defendant requested him to pay the plaintiff, or order, $500, besides the amount stipulated to pay Mr. R. (plaintiff meaning), out of the proceeds of the claim against the Peabody estate, then in his hands, to collect when the same should be collected by him. The acceptance by the defendant of this order was an admission by him, that he had in his hands for collection a claim against the Peabody estate, a portion of the proceeds of which, if collected, belonged to Melville; and the acceptance by him of the order was an undertaking by him to pay such portion to the plaintiff, not exceeding $500. The answer of the defendant shows what this claim against the Peabody estate, referred to in the order, was, and states the amount to be, by the stipulation, paid to the plaintiff, which was, one-half the amount collected. The answer admitted the collection upon the claim, by the defendant, of $1,072, and avers that, after deducting twenty-two dollars for disbursements, he paid the plaintiff $525 under his agreement. The acceptance of the order was an admission by the defendant, that the proceeds of the collection belonged to Melville, over and above what, by the agreement, he was to pay the plaintiff, and his charges for collection. It appearing, by the averments of the answer, that such proceeds amounted to more than $500, the amount of the order, the liability of the defendant to the plaintiff for the latter amount upon the order was established. That this claim of Melville, in the hands of the defendant for collection, was a sufficient consideration for his acceptance of Melville's order to pay the proceeds to the plaintiff, when collected, is too

clear for discussion. The counsel for the respondent concedes this, and the majority of the General Term, by whom the judgment upon the report of the referee was reversed, do not question it; but the latter overlooked the fact that the acceptance of the order by the defendant was an admission by him of Melville's interest in the claim. It follows, that the exception of the defendant to the refusal of the referee to dismiss the complaint, upon the ground that there was no consideration for the acceptance, was not well taken. The defendant then testified that Melville had no interest whatever in the claim; that the only agreement made by him in relation to the claim was with the plaintiff; and the assignment of the judgment by the plaintiff to the defendant, which laid at the foundation of the claim against the Peabody estate, was introduced in evidence, from which it appeared that the defendant was to pay the plaintiff one-half of the amount collected, after deducting his costs and charges for the same, and was not to receive anything from the plaintiff for such costs, etc., in case nothing was collected. The defendant further testified that he was to retain the residue for his own use. He further testified that he was induced to accept the order, by the representation of Melville to him, that the sum he would collect would amount to $4,000, in the belief of which he would pay $500 for Melville's benefit; that all he collected was the $1,072. Melville denied all this, and testified that he procured the plaintiff to make the assignment to the defendant, who previously had agreed with him to accept the same, and collect the claim, and account with him for the proceeds not payable to the plaintiff. This accords precisely with the admission of the defendant, by his acceptance of the order. In this connection, it will be well to consider the following statement in the defendant's sworn answer: "And defendant says that the plaintiff well knew the circumstances under which said draft was accepted, and that, in the whole matter, he acted in concert with the said Melville to obtain from the said defendant the whole amount of said money so collected on said judgment, for the benefit of the said Melville and himself, and to deprive this

defendant from applying the same so received toward the payment of the large indebtedness of the said Melville to said defendant." This is wholly inconsistent with his testimony on the trial, to the effect that Melville had no interest in the claim. The report of the referee contains no express finding by him upon this evidence; but no one can fail to perceive that the decided preponderance of the evidence was that Melville did have the interest in the claim as claimed by the plaintiff, and that a finding that he did not have such interest would have been against the weight of the evidence. It requires no citation of authorities to show that it was the duty of the appellate court, under these circumstances, to assume, in support of the judgment of the referee, that he found that Melville had the interest in the claim as insisted by the plaintiff. The order of the General Term must be reversed, and the judgment upon the report of the referee affirmed, with costs to the appellant.

All concur.

Judgment accordingly.

CHARLES M. HANKINS et al., Respondents, *v.* ABNER BAKER et al., Appellants.

R., a broker, offered to defendants ten casks of prunes, which they agreed, orally, to take. R. executed and delivered to plaintiffs a bought note in defendants' name for the prunes, and received from plaintiffs a warehouse delivery order therefor, which order he delivered to defendants, who received and retained it and requested R. to sell the goods for them. The ten casks had been separated and weighed to plaintiffs and were all they owned at the warehouse, on which the delivery order was given.

Held, that the action of defendants was an adoption and ratification of the acts of R.; and the signature and delivery by him of the bought note, made a valid contract for the sale of the goods within the statute of frauds. Also, that there was a sufficient delivery to charge defendants and maintain an action for goods sold and delivered.

(Argued ; decided December 12th, 1871.)

Statement of case.

APPEAL from judgment entered upon order of the General Term of the Superior Court of the city of New York, overruling defendants' exceptions and directing judgment for plaintiffs upon verdict.

On the 22d August, 1868, Josiah Rich, Jr., a broker, who had received orders from plaintiffs to sell ten casks of prunes, offered them to defendant, for fourteen and seven-eighths cents per pound (currency), thirty days time. Defendants orally agreed to take them. Rich thereupon gave notice to plaintiffs of the sale, and executed and delivered to them the following broker's contract or bought note:

"NEW YORK, *August* 22, 1868.

Purchased for account of Messrs. Baker & Co., of Messrs. Hankins & Williams, at (30) thirty days, (10) ten casks Turkish prunes @ (14⅞) fourteen and seven-eighths cents, c'cy, per pound.

JOSIAH RICH, JR.,
Broker in Fruits and General Merchandise,
[5 c. Rev. Stamp.] 85 Beaver St."

Plaintiffs held a warehouse delivery order for the goods, which they indorsed and delivered to Rich. He delivered the same to defendants who accepted and retained it, and requested Rich to sell the prunes whenever he could get a profit. After the thirty days had elapsed one of the plaintiffs called upon defendants for the pay. They asked to have the matter left for a few days, as they had $10,000 to raise. The prunes had been weighed for plaintiffs at the time they bought. They received from the vendors the warehouse order delivered to Rich.

At the close of plaintiffs' evidence defendants' counsel moved to dismiss the complaint upon the following grounds:

First. That the agreement to purchase was within the statute of frauds and void, because no memorandum was subscribed by the defendants or by their authority, and because no memorandum was subscribed by or on behalf of the

plaintiffs, and because there was no acceptance of the prunes by the defendants.

Second. The action is for goods sold and delivered, and there is not sufficient proof of delivery.

Third. The alleged agreement was not for any specific prunes, nor at the time it was made were the ten casks designated, or their weights known. The defendants have not authorized or assented to the designation or appropriation to the agreement of any particular prunes. No property in any prunes has, therefore, passed to them.

The court denied the motion, and the defendants' counsel excepted.

No testimony was offered by the defendants, and the jury, under the direction of the court, rendered a verdict for the plaintiffs for the sum of $2,128, including interest.

The court ordered judgment to be suspended, and directed the defendants' exceptions to be heard, in the first instance, at the General Term.

Edwards & Odell, for appellants. The broker was not the agent of defendants. He was employed by and acted solely for the plaintiffs. (2 Smith's Leading Cases, 315, note to *Wain* v. *Walters*; *Aguire* v. *Allen*, 5 Leg. Obs., 380; Bk. Lt. 17, § 1, art. 1; Story on Agency, § 31; Pars. Merc. Law, 161; 10 Barb., 74; *Sale* v. *Darragh*, 2 Hilt., 184; *Davis* v. *Shields*, 26 Wend., 341; *Shaw* v. *Finney*, 13 Met., 453; Brown on Frauds, 369; *Moore* v. *Campbell*, 10 Ex., 323.) Defendants' agreement void by the statute of frauds. (3 R. S., 222, § 3, subd. 1, subd. 2; *Rodgers* v *Phillips*, 40 N. Y., 416.) There was no delivery. The action will not lie. (*Evans* v. *Harris*, 19 Barb., 416; *Suydam* v. *Clark*, 2 Sand., 133; *Stanton* v. *Small*, 3 Sand., 230; *McEwan* v. *Smith*, 2 H. of L. Cases, 309; *Frina* v. *Howe*, 16 M. & W., 119; Blackburn on Sales, 297; *McIlvane* v. *Egerton*, 2 Robt., 424; *Briggs* v. *Sizer*, 30 N. Y., 653.) An acceptance of the goods necessary. There was none. (Story on Contracts, § 792, a.; Benj. on Sales, 127; *Shindler* v.

Houston, 1 Com., 261; Id., per WRIGHT, J., 269; *Brand* v. *Focht*, 5 Abb., N. S., 225; *Outwater* v. *Dodge*, 6 Wend., 397; *Kent* v. *Hutchinson*, 3 Bos. & Pul., 232; *Bentall* v. *Burn*, 3 B. & C., 423; *Boardman* v. *Spooner*, 13 All., 353; *Gill* v. *Pavenstedt*, 7 Am. L. Reg. (N. S.), 672; *Rogers* v. *Phillips*, 40 N. Y., 519. The agreement was executory. No title passed to defendants. (Benj. on Sales, 241; *Wallace* v. *Breeds*, 13 East, 522; *Burk* v. *Davis*, 2 M. & S., 397; *Austin* v. *Craven*, 4 Taunt., 644; *Shepley* v. *Davis*, 5 id., 617; *Gillett* v. *Hill*, 2 C. & M., 530; *Crofoot* v. *Bennett*, 2 N. Y., 259; *Gardner* v. *Suydam*, 7 id., 357; *Campbell* v. *Mersey Docks*, 14 C. B., N. S., 412; *Godts* v. *Rose*, 17 id., 229; *Jenner* v. *Smith*, L. R., 4 C. P., 270; Blackburn on Sales, 151, 152; *Hanson* v. *Meyer*, 6 East, 614; *Zagury* v. *Furnell*, 2 Campb., 240; *Joyce* v. *Adams*, 8 N. Y., 291; *Terry* v. *Wheeler*, 25 id., 525; *Fitch* v. *Beach*, 15 Wend., 221; *Ward* v. *Shaw*, 7 id., 404; Story on Contracts, § 800; *Simmons* v. *Swift*, 5 B. & C., 857; *Logan* v. *Le Mesaurier*, 6 Moore, 116; *Reimers* v. *Ridner*, 2 Robt., 21; *Gill* v. *Pavenstedt*, 7 Am. L. R., N. S., 676.)

Quackenbos & Shaw, for respondents. This case not within statute of frauds. (2 Kent's Com., 10th ed., 715; Story on Agency, 5th ed., §§ 28–31; Paley on Agency, 171, note *p*; Parsons' Merc. Law, 161; *Rucker* v. *Commeyer*, 1 Esp., 10; *Hinde* v. *Whitehouse*, 7 East, 558–569; *Kimble* v. *Atkins*, 7 Jur., 260; *Hinckley* v. *Arey*, 27 Me., 362; *Graves* v. *Legg*, 34 Eng. L. & E., 489; Hilliard on Sales, 68, 64, 477, § 18; *Mc Whorter* v. *McMahon*, 10 Paige, 386; *Champlin* v. *Parish*, 11 id., 405; *Laurence* v. *Taylor*, 5 Hill, 107; *Maclean* v. *Dunn*, 4 Bing., 722; Paley on Agency, 143.) The acceptance by defendants of the warehouse order was a delivery of the goods. (Hilliard on Sales, 89, 94, 95; *Searle* v. *Reeves*, 2 Esp., 598; *Hollingsworth* v. *Napier*, 3 Caines, 182; *Pleasant* v. *Pendleton*, 6 Rand., 473; *Sigerson* v. *Harker*, 15 Miss., 101; *Jewett* v. *Warren*, 12 Mass., 300; *Bedlam* v. *Tucker*, 1 Pick., 389; *Rice* v. *Austin*, 17 Mass., 197; *Wilkes* v. *Ferris*,

5 Johns., 335; *Howes* v. *Starkweather*, 17 Mass., 240; *Stanton* v. *Small*, 3 Sandf., 240; Story on Sales, §§ 301, 311; *Shindler* v. *Houston*, 1 Comst., 266; *Dunham* v. *Pettee*, 4 Seld., 508; *Archer* v. *Zeh*, 5 Hill, 205.)

FOLGER, J. If it be conceded as it must, that the defendants did not in person sign any note or memorandum of the contract, and if it be further conceded that Rich was not an agent of the defendants when he signed the bought note, and that unless he was their agent by authority or adoption, they would not be bound thereby, there yet remains the question whether they did not afterward ratify his acts and so make them their own and thus become bound.

It appears in the testimony that Rich was a broker for the sale of this kind of goods, and was known to the defendants as such; that he had offered to the defendants other lots of them, which the defendants had declined to purchase; that he then offered to them these ten casks, which they agreed orally to take; that he then left the defendants, but soon returned to them with the plaintiffs' warehouse delivery order for the ten casks, which order he delivered to them; that they received and retained it and requested Rich to sell the goods for them, if he could get a profit; that afterward as the testimony tends to show, the defendants went and examined the goods, and, when called upon by the plaintiffs for payment, they did not deny their liability but asked for lenity. An inspection of the warehouse delivery order shows that it came from the plaintiffs, and gave to the defendants the knowledge or the means of knowledge, that the plaintiffs were the vendors of the goods.

It is held, that though there is no employment of a person in the first instance his acts may be subsequently adopted. The adoption relates back to the time of the original transaction, and is deemed in law the same to all purposes, as if authority had been given before. (*Lawrence* v. *Taylor*, 5 Hill, 107; *Maclean* v. *Dunn*, 4 Bing., 722; 15 E. C. R., 129.) It seems then, that the action of the defendants, being with

knowledge of the acts of Rich, was an adoption of those acts and a ratification of them. (*Maclean* v. *Dunn*, *supra*.)

And as Rich, when he signed and delivered to the plaintiffs the bought note, did make a note or memorandum of the contract in writing subscribed by the party to be charged thereby, there was a valid contract for the sale of the goods. (*Maclean* v. *Dunn*, *supra*.)

Holding that there was a valid contract of sale, we need treat the question of a delivery only as it was necessary to charge the vendees on that contract, and to put the goods at their risk and maintain an action for goods sold and delivered. There was no manual delivery. But an actual delivery is not required. A symbolical delivery suffices. A delivery of an order on a warehouseman may be enough. (*Hollingsworth* v. *Napier*, 3 Caines, 132, and note *a*; and see *Dunham* v. *Mann*, 4 Seld., 508.) Nor did anything remain to be done to the goods by the plaintiffs. They had been weighed to the plaintiffs, and reweighed for the defendants. They had been separated to the plaintiffs from the larger quantity owned by their vendors. These ten casks were all that the plaintiffs owned at the warehouse on which the delivery order was given. So that it was these specific ten casks which the plaintiffs sold and delivered to the defendants. And though no testimony was given of the weight, yet that is alleged in the complaint, and, as no point was made of it upon the motion for a nonsuit, it must have been assumed at the trial as correctly stated therein. It was an omission so easily supplied, had attention been called to it, that we would not be warranted in now reversing a judgment because of it.

The judgment appealed from should be affirmed, with costs to the respondents.

All concur.

Judgment affirmed.

THOMAS F. YOUNGS et al., Respondents, *v.* GEORGE L. KENT, et al., Appellants.

An answer, insufficient in form or substance, is not necessarily frivolous. Such an answer may be amended by leave of the court, but a frivolous answer is evidence of bad faith, and not ordinarily amendable. That only may be regarded as frivolous, which is made to appear so incontrovertibly, by a fair statement of it without argument.

When the answer puts in issue material allegations of the complaint, although its form and structure indicate that the intention of the pleader is to present a different question, yet the issues in fact presented cannot be disregarded, and the court cannot, by a summary judgment, deprive the defendants of the right of a trial of the issues thus formed.

(Argued December 6th, 1871; decided December 12th, 1871.)

APPEAL from judgment of the General Term of the Superior Court of the city of New York, affirming an order of Special Term striking out defendants' answer as frivolous, and affirming a judgment entered thereon.

S. Hand, for appellants. Plaintiffs were bound to fully complete their part of the contract. (16 Wend, 632; 21 N. Y., 398; 26 N. Y., 217; 17 N. Y., 173; 2 Sweeny, 267.) Plaintiffs having noticed the cause for trial, were precluded from moving for judgment on the answer as frivolous. (Code, § 256; Superior Court, *Kellogg* v. *Baker*, 15 Abb., 286; *Esmond* v. *Vanbenschoten*, 5 How., 44; *Phillips* v. *Suydam*, 6 Abb., 289.)

James C. Carter, for respondents. Defendants admit the delivery of the goods and are liable for them. (*West* v. *The Am. Exc. Bank*, 44 Barb., 179; Code, § 194; Stephens on Pleading.) The failure of the goods to conform to the sample, furnishes no ground of defence to an action for the price. (Benjamin on Sales, 422, 479, 482; *Reed* v. *Randall*, 29 N. Y., 358; *Sprague* v. *Blake*, 20 Wend., 61; *Hargous* v. *Stone*, 5 N. Y., 73; *McCormick* v. *Sarson*, 38 How. Pr., 190, affirmed in Court of Appeals, see list in 40 How. Pr.; *Hoe*

v. *Sanborn*, Court of Appeals, 3 Abb. N. S., 195.) Plaintiffs not required to show frivolousness. This being an appeal from a judgment, the question is whether it is right on the merits. (*East River Bank* v. *Rogers*, 9 Bos., 493.)

PER CURIAM. Without passing upon the merits of the answer, so far as it attempts an affirmative defence, we are of the opinion that material allegations of the complaint were put in issue by other parts of the answer. The allegations in the complaint of the quantity delivered of the sugar in the aggregate, were material, and if controverted presented an issue of fact for trial. It is true the denial of those allegations are not as artistic and formal as they might, and, perhaps, should have been, but they are not among the allegations expressly admitted, and they are not alluded to in the statement of special facts alleged in the answer, and, therefore, may be regarded as controverted under the denial of each and every allegation of the complaint except as "herein admitted or stated."

It is possible that the pleader had it not in his mind in preparing the answer to make a point upon the quantity and value of the property, but to contest only the cause of action. But the allegations of the complaint and the denial of the answer are upon the record, and the court cannot, by a summary judgment, deprive the defendants of the right of a trial of the issue thus formed. The question presented was neither frivolous nor immaterial. The form and structure of the answer would indicate, that the right of the plaintiffs to recover at all was the question intended to be made. But by the forms of pleading the other question is, in fact, presented, and cannot be disregarded.

This conclusion obviates the necessity of determining any question as to the sufficiency of the defence attempted by the statements of the answer aside from the denial.

An answer may be bad upon demurrer and so held, and yet not be frivolous so as to authorize a summary judgment. An answer merely defective in form or substance, may be amended

by leave of the court, either upon demand or upon the trial of the issues, but a frivolous answer is evidence of bad faith, and is not ordinarily amendable.

The fact that an answer is insufficient in form or substance, does not necessarily determine that it is frivolous. That only may be regarded as frivolous, which is made to appear so incontrovertibly by a bare statement of it and without argument. If an argument is required to show that the pleading is bad, it is not frivolous. But without considering the sufficiency of the answer, or whether it is or is not frivolous, or the legal questions presented by it; for the reason that there was a material issue of fact presented by the pleadings which should have been tried, the judgment is reversed, and the action remitted to the court below for further proceedings, costs to abide the event.

All concur.

Judgment reversed.

MARY JANE THOMPSON, Respondent, *v.* THE AMERICAN TONTINE LIFE AND SAVINGS INSURANCE COMPANY, Appellant.

An acceptance by a wife from her husband of a policy of insurance upon his life, procured by him for her benefit, without previous authority from her, is a sufficient adoption of his act, and constitutes a valid contract between her and the company issuing the policy.

C. F. T., general agent of defendant, appointed D. W. T. and his partner sub-agents, and on the same day received the application of D. W. T. for a policy, which was forwarded to defendant. At the same time, C. F. T. asked the sub-agents for a loan or advance, stating he needed it on his journey, and that they should charge it to the company on premiums to be collected thereafter. D. W. T. thereupon made the required advance. Afterward, the policy was received by D. W. T. by mail.—*Held*, that the transaction was not a loan to C. F. T., upon his individual credit, but an advance by the sub-agent to the general agent on account of premiums expected to be collected, including the premium on the policy in question, and was, in effect, a payment in advance of that premium, subject to the condition of the acceptance of the risk.

(Argued December 4, 1871; decided December 12, 1871.)

Opinion of the Court, per RAPALLO, J.

APPEAL from judgment of the General Term of the Supreme Court in the third judicial district, affirming a judgment entered in favor of plaintiff upon the report of a referee.

The action was brought to recover the amount of a policy of insurance alleged to have been issued by defendant to plaintiff upon the life of her husband, Daniel W. Thompson. The facts sufficiently appear in the opinion.

John N. Whiting, for appellant. The policy was void under the statute against betting and gaming. (2 R. S., 924; 3 Kent's Com., 8th ed., 448, chap. 656.) Laws of 1866 must be strictly complied with. There was no contract by defendant with anybody, no delivery; and the ordinary rules, as to third parties acting in good faith, do not exist here. (*Baker* v. *U. Mut. Life Ins. Co. of Maine*, 43 N. Y., 283.)

RAPALLO, J. The plaintiff was authorized, by statute, to cause the life of her husband to be insured for her use. But we held, in the case of *Baker* v. *The Union Mutual Life Ins. Co.* (43 N. Y., 283), that, independently of the statute, the wife had an insurable interest in the life of her husband, and that an insurance procured by him for her benefit was good at common-law. The insurance in the present case was procured by the husband without previous authority from his wife, and by the terms of the policy she was the assured. But her subsequent acceptance of the policy from him was a sufficient adoption of his act to constitute a valid contract between her and the company, unless the objections that the premium was not paid, and that the policy was never duly delivered can be sustained.

The court below found adversely to the defendant on both of these issues, and if there is any evidence to sustain these findings they are conclusive.

No question is made but that the policy, duly executed, was sent by the defendant, by mail, to D. W. Thompson, and by him received and delivered to his wife, who retained it until after his death. It is contended, however, that he having

been at the time an agent of the defendant, must be deemed to have received it in that capacity, and that he had no authority to deliver it to his wife, the assured, without payment of the premium, and that the evidence establishes that the premium was not paid. The question of delivery, therefore, depends upon the question of payment.

The policy contains a receipt for the premium, but this receipt is open to explanation. (*Baker* v. *Union Mutual Ins. Co.*, *supra.*) The facts proved at the trial in respect to the payment of the premium were, that C. F. Thompson, general agent of the defendant, appointed D. W. Thompson and his copartner, Dix, as sub-agents, on the 14th of October, 1868, and on the same day received Thompson's application for the policy in question, which was, thereupon, forwarded to the defendant. At the same time C. F. Thompson asked Thompson & Dix for a loan or advance of some money, stating that he needed it on his journey, and that it should be charged to the company on premiums, to be collected by Thompson & Dix thereafter. He also stated that he (C. F. Thompson) was in the habit of collecting money in that way. D. W. Thompson, thereupon, made the required advance. The amount of the advance does not appear. Ten days afterward the policy was received by D. W. Thompson, by mail.

No evidence was given, on the part of the defendant, for the purpose of showing that the transaction in question did not come to its knowledge before the sending of the policy, except the statement of the secretary, that he first heard of payments of premium by a report of Dix, dated January 9th, 1869. Nor was there any evidence that the acts of C. F. Thompson were out of the usual course of dealing, or beyond the scope of his actual authority as general agent. But the defendant relies upon the legal proposition, that the advance made by D. W. Thompson was, upon its face, a loan to C. F. Thompson individually, and that his instruction to charge it to the company, or to apply future premiums to its satisfaction, was manifestly beyond the scope of his powers as agent.

We think, however, that the dealing will bear the interpre-

tation, that it was not a loan to *C. F. Thompson* on his individual credit, but an advance by the sub-agent to the general agent as such, on account of the premiums which the former expected to collect for the defendant, including the premium which would become payable on his wife's policy, in case the company should accept the application cotemporaneously made for that policy. It is not necessary to examine the effect of the advance beyond that which it would have in respect to this particular premium. The authority of the general agent to receive premiums is not disputed, and it could hardly be said, especially in the absence of any evidence on the part of the defendant in respect to the precise limits of his authority, that they would be exceeded by his receiving the premium in advance at the time of the application for insurance, subject to the condition of the acceptance of the risk by the company. It seems to us, that in passing upon the question of fact the court below was authorized to infer from the evidence, that such was the intention and understanding of the parties, in respect to so much of the advance as was covered by the premium on the plaintiff's policy, and that thus viewed the evidence was sufficient to sustain the finding.

The judgment should be affirmed with costs.

All concur.

Judgment affirmed.

LOUIS SELTENREICH, Respondent, *v.* NICHOLAS HIEMENZ, Appellant.

In an action for work, and labor and materials furnished in manufacturing certain articles for defendant, the defence was that the articles were not to be paid for, until defendant should collect and receive pay from those to whom he should sell them, and that, in consequence of the unskillful manner of their construction, the articles were defective, and the defendant's vendees refused to pay therefor.

Held, it was not competent for defendant, upon the trial, to show that his vendees claimed damages.

The judge charged the jury, that, if they found the agreement was, that defendant might sell on a reasonable term of credit, and he had so sold

Statement of case.

and that term had expired, then plaintiff could recover, though defendant had not been paid by his vendees: to which defendant excepted.—*Held*, exception not well taken.

(Argued December 5, 1871; decided December 12, 1871.)

APPEAL from order of the General Term of the Supreme Court, in the fourth department, and the judgment entered thereon, affirming an order of the Special Term, denying a motion for a new trial.

The action was for work, labor and materials done and furnished by the plaintiff for the defendant, in the manufacture of beer coolers.

There was no conflict of evidence as to the value of the materials and work and labor; but the point litigated on the trial was, whether the plaintiff was or was not to give credit until the brewers to whom defendant sold the coolers should pay the defendant. The questions raised upon the trial, presented here for review, and the evidence relating thereto, sufficiently appear in the opinion.

The action was tried at November Circuit, 1868, in Erie county, and a verdict rendered for the plaintiff for $768.43.

Lewis & Gurney, for appellant. Defendant, on the undisputed evidence of the agreement as to time of payment, was entitled to a verdict. (*Bartlett* v. *Hoppock*, 34 N. Y., 118, 125; Spence Eq. Jur., vol. 1, p. 556; *Crouse* v. *Fitch*, 7 Trans. App., 101, 103; *The Townsend Mfg. Co.* v. *Foster & Tower*, 51 Barb., 346; *Adsit* v. *Wilson*, 7 How. Pr., 64.) A party is entitled to recover all damages, including gains prevented as well as losses sustained. (*Griffin* v. *Colver*, 16 N. Y., 480; *Internat. Bank* v. *Montauk*, 39 id., 297.) "It is error of law for a court to find a fact of which there is no evidence." (*Brush* v. *Lee*, 36 N. Y., 49; 3 Abb. Pr., N. S., 204; *Byant* v. *Byant*, 42 N. Y., 17, 18.) On an entire failure of proof, this court will reverse judgment, though no exception was taken on the trial. (*Brookman* v. *Hamill*, 43 N. Y., 554.)

James Sheldon, for respondent.

PER CURIAM. 1st. The offer of evidence by defendant was properly refused. The answer set up, that by agreement, he was not to pay for the coolers any sooner than he should receive payment therefor, from those to whom he should sell. It then avers that the plaintiff agreed and warranted that they should be made in a substantial, skillful and workmanlike manner. It then negatives the making of them in that manner, and avers that thereby they leaked badly and some of them burst, and some of the vendees of them refused to pay for them, and claimed large damages against the defendant, and that the defendant has been unable to collect any pay for them on account of the plaintiff's failure to make the same as agreed, and that thereby the defendant had lost large profits, and had become liable to large damages. The offer of evidence was, we infer, under this part of the answer.

It was, that certain of the coolers leaked, owing to the unskillful manner in which made, and that the vendee claimed damage against the defendant. It was competent for him to prove that the coolers were not well made; and the testimony to that was admitted. But it was not proper to show that the vendee claimed damage. It did not tend to establish anything in issue between the parties to the action. There was nothing definite. It showed no damage. The testimony was properly rejected.

2d. The judge charged the jury, that, if they found the agreement was that the defendant might sell the coolers on a reasonable term of credit, and he had so sold them on a customary and reasonable credit, and that had expired, then the plaintiff might recover, though the defendant had not been paid by his vendee. To this the defendant excepted. The exception was not well taken, if there was any testimony given from which the jury might properly so find.

The plaintiff testified, without objection, that he told defendant he would wait for pay until he got his money in from the brewers, usual time; that what he meant to be understood in his testimony was that he would wait for his pay a reasonable time. It was in testimony from both the plaintiff and the

defendant that one customer of the defendant requesting an unusual length of credit, the defendant, before giving it, asked the plaintiff's assent to it. It is true that there was testimony to the reverse of that given by the plaintiff, conflicting with it directly; but if the jury believed the plaintiff circumstantially sustained by the agreement with him of the defendant, as to the assent of the plaintiff being sought to an unusual time of credit, they had testimony before them on which to find in accordance with the rule given to them by the charge excepted to. There was no error in the charge.

3d. The Special and the General Terms refused to set aside the verdict as against the weight of evidence. This refusal is not reviewable in this court. (*East River Bank* v. *Kennedy*, 4 Keyes, 279.) If it were, we should not be able to find an error in so ruling, for, as we have already stated, there was evidence to sustain the charge of the judge excepted to, and the same evidence, though contradicted, will sustain the verdict, for there was not such a preponderance of evidence against it as to completely overbear it.

The judgment appealed from must be affirmed, with costs to the respondent.

All concur.

Judgment affirmed.

MEMORANDA

OF

CAUSES DECIDED DURING THE PERIOD EMBRACED IN THIS VOLUME, MARKED "NOT TO BE REPORTED."

CHARLES H. DARNEY et al., Appellants, *v.* SIMON STEPHENS, COURTLAND P. DIXON, EDWARD LEARNED, WILLIAM L. PALMER, and EDWIN L. SIMPSON, Respondents.

(Argued June 22d, 1871; decided September 2d, 1871.)

ACTION brought against defendants as trustees of the Simpson Water-proof Manufacturing Company (they having failed to file statement required by law), to recover balance of a draft alleged to have been drawn by said company under an agreement with plaintiffs for credit. Judgment for plaintiffs on trial. Reversed by General Term and new trial ordered, on the ground that the proof was insufficient to establish the fact, that an agreement for credit was made with the company, or that the draft was drawn by the company.

W. D. White, for appellants.

J. Shearman, for respondent Stephens.

A. Stickney, for respondents Dixon et al.

RAPALLO, J. reads opinion for affirmance of order as to defendants, LEARNED, DIXON, and PALMER, with costs and reversal of order, and affirmance of judgment entered on report of referee as to Stephens, with costs, deducting $100 with interest from September 1st, 1865, to December 18th, 1869, amounting to $130.08.

All concur.

Judgment accordingly.

The grounds of the decision are, that defendant Stephens, in his answer admits the agreement for credit, and making of draft, and as to him no proof was necessary. The $100 deducted was an error in computation.

ALFRED C. HOUGH et al., Respondents, *v.* AMERICAN BAPTIST MISSIONARY UNION, Appellant.

(Argued February 2d, 1871; decided February 5th, 1871.)

A. B. Capwell, for appellant.

J. Stanley, for respondents.

This case presents the same questions, and is affirmed on the opinion written in *White et al.* exr. v. *Howard et al.* (*ante*, p. 144).

CHARLES LANEL, Respondent, *v.* WILLIAM W. VAN WAGENEN, Appellant.

(Argued March 29th, 1871; decided September 5th, 1871.)

W. W. Van Wagenen, appellant, in person.

T. J. Glover, for respondent.

Agree to affirm. No opinion. Ch. J. and ALLEN, J., not voting.

CHARLES LANEL, Respondent, *v.* WILLIAM W. VAN WAGENEN, Appellant.

(Argued April 17th, 1871; decided September 5th, 1871.)

W. W. Van Wagenen, appellant, in person.

T. J. Glover, for respondent.

Agree to affirm. No opinion. Ch. J. and ALLEN, J., not voting.

SAMUEL HAIGHT et al., Respondents, *v.* HENRY E. WILLIAMS, Appellant.

Since the Code this court has no more power to review a question of fact in an equity suit, than in an action at law.

(Argued June 12th, 1871; decided September 5th, 1871.)

G. H. Brewster & T. Hyslop, for appellant.

D. P. Barnard, for respondents.

ACTION by Haight, a former partner of defendant, and assignees for an accounting and recovery of an alleged balance due on the dissolution of the firm. Judgment for plaintiffs affirmed at General Term.

PECKHAM, J., reads opinion for affirmance.

All concur.
Judgment affirmed.

SAMUEL FORDHAM, Respondent, *v.* WILLIAM SMITH, Appellant.

A party must be held to have believed each witness called by him credible, and to have so presented him to the court. A referee has a right to find a witness mistaken; and if there is a contradiction between him and another, to decide the question of fact contrary to his statement. But he cannot judicially deem an uncontradicted witness, testifying against the party calling him, false and perjured, and so holding to infer the truth of the matter to be the reverse of what was testified.

(Argued June 21st, 1871; decided September 5th, 1871.)

ACTION for the alleged unlawful conversion of a promissory note made by defendant and delivered to plaintiff. The referee found that the note came again unlawfully into the possession of defendant, and was by him in collusion with the payee destroyed. Plaintiff called defendant as a witness, who testified that he knew nothing of the note, had not got it, and never had seen it since he gave it to the payee, and did not know what had become of it.

There was no direct testimony to the contrary. The referee found for plaintiff. Judgment thereon affirmed by General Term.

J. H. Bergen, for appellant.

W. J. Osburn, for respondent.

FOLGER, J., reads opinion for reversal and new trial.

Ch. J. ALLEN, RAPALLO, and ANDREWS, JJ., concur.
Judgment reversed.

JOHN R. CLUTE, Appellant, *v.* GARRETT A. NEWKIRK et al., Respondents.

The continuance in possession of a grantor of real estate after the conveyance, while it may be a circumstance proper to be considered, in connection with other evidence tending to show a design to defraud creditors, does not of itself, warrant a finding as a legal conclusion, that the deed was fraudulent.

(Argued June 22d, 1871; decided September 5th, 1871.)

ACTION to set aside the conveyance of certain real estate deeded by one J. to defendant, N., and by him assigned to the other defendant for the benefit of his creditors, on the ground that the conveyance to N. was fraudulent and void, as to the creditors of J. It was also claimed that the deed to N. was, in fact, a mortgage, and that J. had an interest subject to plaintiff's judgment. Upon this question it was

decided that there was a parol conditional agreement to re-convey, but no loan.

E. F. Bullard, for appellant.

S. W. Jackson, for respondents.

GROVER, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

WILLIAM B. DUNCAN et al., Appellants, *v.* JACOB BERLIN et al., Respondents.

Where money is paid under a mistake of fact, negligence in making the mistake does not prevent the party paying from recovering it back, if the other party has not been prejudiced.

(Submitted June 22, 1871; decided September 5, 1871.)

PLAINTIFFS, bankers in New York, had an account with H. Blagge & Co., of Texas, and supposed there was a balance due that firm. Defendants, creditors of B. & Co., attached the balance, obtained judgment, and plaintiffs paid over to the sheriff, on the execution, under protest, $2,924.33. Upon settling the accounts, it was discovered that but $1,000 was due on the account. To recover back the $1,924.33, this action was brought. Judgment was given for defendants, which was affirmed by the General Term.

W. D. White, for appellants.

F. C. Cantine, for respondents.

RAPALLO, J., reads opinion for reversal and new trial.
All concur.
Judgment reversed.

PETER WOHLER, Respondent, *v.* THE BUFFALO AND STATE LINE RAILROAD COMPANY, Appellant.

Where the owner of land in a village lays out streets through the same, divides the residue into village lots, causes a map of the same to be recorded in the county clerk's office, and conveys the lots bounded on such streets, if the same are not accepted by the proper authorities, or worked and used as public highways, they do not become such.

An action can be maintained by the owner of land for an entry thereon and ouster, but damages can only be recovered for the simple entry and ouster, and not for the continuation of the trespass. Those damages are only recoverable after the possession has been regained. (CHURCH, Ch. J., GROVER and ALLEN, JJ., concurring.)

(Argued February 1, 1871; decided September 11, 1871.)

M., the owner of certain real estate in Dunkirk, laid out streets through, divided the same into village lots, and caused a map to be made and recorded in the county clerk's office. He conveyed one lot to plaintiff, the southern boundary of which was "the center of East Third street," one of said streets. Said street was never opened or used. Defendant's track was built on the north half of the alleged street, and used and occupied for its purposes. Plaintiff brought trespass, and obtained a verdict at circuit, the judgment whereon was affirmed at General Term.

J. Ganson, for appellant.

W. A. Barden, for respondent.

GROVER, J., reads opinion for reversal and new trial.

CHURCH, Ch. J., and FOLGER, J., concur.

ALLEN, J., concurs in the decision, for error in the admission of evidence.

PECKHAM, RAPALLO, and ANDREWS, JJ., not voting.

Judgment reversed.

CONRAD MILLER, Respondent, *v.* THE BUFFALO AND STATE LINE RAILROAD COMPANY, Appellant.

THIS case presented the same question, and was argued and decided, with last cause.

JOHN M. BUCKINGHAM, Respondent, *v.* THOMAS DENNY et al., Appellants.

(Argued ; decided September 11, 1871.)

S. Hand, for appellants.

N. C. Moak, for respondent.

Decided upon the ground that the only material questions were those of fact, which were disposed of below.

PECKHAM, J., reads opinion for affirmance.

All concur.

Judgment affirmed.

SAMUEL L. HILLIARD, Appellant, *v.* WILLIAM L. BROWN, Respondent.

(Argued September 12, 1871; decided November 10, 1871.)

Agree to dismiss appeal. No opinion.

EMIL LOSS et al., Respondents, *v.* CHARLES E. WETMORE, Appellant.

(Argued September 14th, 1871; decided November 10th, 1871.)

C. F. Wetmore, for appellant.

Mitchell & Seymour, for respondents.

Decided upon the facts in the case. CHURCH, Ch. J., reads opinion for affirmance.

All concur.

Judgment affirmed.

CHARLES J. BISHOP, Respondent, *v.* JOHN FERGUSON, Appellant.

(Argued September 14th, 1871; decided November 10th, 1871.)

L. L. Bundy, for Appellant.

H. J. Prindle, for respondent.

Agree to affirm. No opinion.

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122 282

DUANE C. ALLIS, Respondent, *v.* JOHN LEONARD et al., Appellants.

Where a complaint upon a promissory note alleged a making and delivery of the note to the payee, and a sale and delivery thereof to plaintiff, who was owner, etc., the answer admitted "the making and delivery of said note as averred in the complaint," but denied each and every other allegation, and set up payment.

Held, the answer put in issue the sale and delivery, and authorized proof on the part of defendant that the payee was, in fact, the owner, and that the note had been paid to him.

(Argued September 15th, 1871; decided November 11th, 1871.)

M. M. Waters, for appellants.

Ballard & Warner, for respondent.

RAPALLO, J., reads opinion for reversal and new trial.

All concur.

Judgment reversed.

JOHN GOSS, Appellant, *v.* HORATIO N. MATHER, Respondent.

Defendant made his promissory note payable to plaintiff, which was indorsed by the latter and by T. Judgment was obtained thereon by the holder, who assigned it to N. for the benefit of T. Certain real estate of plaintiff's was sold upon the execution issued on said judgment. N. purchased and took a certificate of sale for the benefit of T., but in his own name. Defendant, ignorant of the sale and deceived by T., paid the judgment in full to T., receiving a formal satisfaction of the judgment from N. Subsequently, plaintiff paid T. the amount of the bid on the sale, and received an assignment of the sheriff's certificate from N. After the discovery of the fraud practiced by T., plaintiff brought an action against him, therefor obtained judgment, and collected a portion thereof. He then brought this action to recover the residue of the money paid by him.—*Held*,

1st. The payment of the judgment to T., and satisfaction thereof, operated to cancel sale, and was, in fact, a redemption. Plaintiff was, therefore, under no legal obligation to redeem, and having paid the money to T. in ignorance of the facts, could recover it back, but had no claim against defendant, and,

2d. Even if this were not so, plaintiff had the election to affirm sale, claim it as payment of the judgment and sue defendant, or to claim the sale as canceled by the transaction between defendant and T., and sue the latter to recover back the money paid. But he could not pursue both, as they are inconsistent. Having elected to pursue the latter remedy, he is estopped from pursuing the former, although he failed to recover his whole judgment of T.

(Argued September 15th, 1871; decided November 11th, 1871.)

S. S. Spring, for appellant.

D. H. Bolles, for respondent.

CHURCH, Ch. J. reads opinion for affirmance.
All concur.
Judgment affirmed.

J. D. DIX et al., Appellants, *v.* LOUIS M. BROCK et al., Respondents.

(Argued November 20, 1871; decided November 28, 1871.)

J. Norris, for appellants.

J. Sheldon, for respondents.

Decided upon the facts in the case.

PECKHAM, J., reads an opinion for affirmance.

All concur.
Judgment affirmed.

LOUIS M. BROCK et al., Appellants, *v.* NEHEMIAH PIERSON et al., Respondents.

(Argued and decided with the last.)

These two cases were practically consolidated below. One judgment was entered, which was affirmed by the General Term of the Superior Court of Buffalo; one judgment of affirmance being entered. Two remittiturs were sent down. A motion was made to correct the remittiturs, which was decided January 30, 1872.

Held, that but one judgment should have been entered, with one bill of costs. Ordered, that remittitur be corrected accordingly. Opinion by ALLEN, J.

WILLIAM SWANZY, Respondent, *v.* GERARDUS DE FOREST, Appellant.

(Argued November 24, 1871; decided November 28, 1871.)

N. Smith, for appellant.

E. L. Lowe, for respondent.

Agree to affirm. No opinion.

WILLIAM R. BOLE, Respondent, *v.* NOAH COOK et al., Appellants.

Decided upon the ground that the objections on the trial to the reception of evidence (alleged as error) were insufficient to present the questions.

(Argued November 22, 1871; decided November 28, 1871.)

C. D. Murray, for appellants.

W. Woodbury, for respondent.

GROVER, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

AMOS K. HADLEY, Respondent, *v.* ELEAZER AYERS, Appellant.

(Argued November 22, 1871; decided November 28, 1871.)

Decided on the facts in the case.

J. B. Perry, for appellant.

J. H. Reynolds, for respondent.

GROVER, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

GEORGE N. TITUS, Respondent, *v.* GEO. BRISBANE, impleaded, etc., Appellant.

(Argued November 23, 1871; decided November 28, 1871.)

C. Crary, for appellant.

J. Westervelt, for respondent.

Agree to affirm.
No opinion.

MYNDERT W. STARIN et al., Respondents, *v.* THE SYRACUSE, BINGHAMTON AND NEW YORK RAILROAD COMPANY, Appellant.

(Argued November 23, 1871; decided December 5, 1871.)

Decided upon the same grounds as the case of *Sherman Wood* v. *The N. Y. C. R. R. Co.*, which will appear in next volume of Court of Appeals reports.

M. Goodrich, for appellant.

G. N. Kennedy, for respondents.

PECKHAM, J., reads opinion for affirmance.
All concur.
Judgment affirmed.

THE DODGE & STEVENSON MANUFACTURING COMPANY, Appellant, *v.* LAWRENCE L. CURTIS, Respondent.

(Submitted November 27, 1871; decided December 5, 1871.)

Order granting new trial affirmed, and judgment absolute for defendant.
All concur.

SIDNEY N. DILASS, Appellant, *v.* WILLIAM WOODBURY, Respondent.

(Argued for appellant November 27th, 1871; decided December 5th, 1871.)

A. G. Rice, for appellant.

Agree to affirm. No opinion.

CATHARINE STEENBURGH, Respondent, *v.* PETER W. HOUSE, Appellant.

(Argued December 5th, 1871; decided December 12th, 1871.)

E. Cowen, for appellant.

J. O. Ormsby, for respondent.

Agree to dismiss appeal. No opinion.

ELIZABETH FOX, Appellant, *v.* JONAS DUNCKEL, Respondent.

(Argued December 5th, 1871; decided December 12th, 1871.)

Case and points not received.

Agree to affirm. No opinion.

THOMAS HARLAND et al., Respondents, *v.* CHRISTIAN H. LILIENTHAL, Appellant.

(Argued December 5th, 1871; decided December 12th, 1871.)

Norris & Lord, for appellant.

J. L. Hill, for respondents.

Agree to affirm. No opinion.

JOSEPH B. TRACY, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

DAVID CLARK, Respondent, *v.* THE SAME, Appellant.

ROBERT H. STEVENS, Respondent, *v.* THE SAME, Appellant.

ACHSA S. CRANE, Respondent, *v.* THE SAME, Appellant.

WILLIAM C. STILES, Respondent, *v.* THE SAME, Appellant.

HAZEN L. HOYT, Respondent, *v.* THE SAME, Appellant.

WILLARD H. STEVENS, Respondent, *v.* THE SAME, Appellant.

WILLIAM HALLOWAY, Respondent, *v.* THE SAME, Appellant.

GEORGE H. THOMPSON, Respondent, *v.* THE SAME, Appellant.

—— PIERCE, Respondent, *v.* THE SAME, Appellant.

The foregoing ten causes present the same questions, and were argued and decided with *James H. Fisher*, administrator, etc., respondent, *v. The N. Y. C. and H. R. R. Co.*, appellant, *ante*, p. 644.

PROCEEDINGS

ON ANNOUNCEMENT OF THE

DEATH OF HON. HIRAM DENIO.

At the session of the Court of Appeals at the court room in the capitol, on the 21st November, 1871, there was present a large attendance of members of the bar and others, it being understood that some action would be taken on the subject of the then recent death of Judge DENIO. At twelve o'clock Mr. Amasa J. Parker rose and addressed the court as follows:

The melancholy duty has been assigned to me of announcing to this court the death of HIRAM DENIO, and asking that the customary tribute of respect shall be paid to his memory. To no one who has preceded him has that tribute been more justly due.

Judge DENIO died at his residence at Utica, on Sunday the fifth instant, in the seventy-third year of his age. Surrounded by friends who loved him, and in a community where he was held in the highest respect, he sank peacefully to his rest, full of years, crowned with the honors of this world, and looking forward, in the full confidence of Christian faith, to that brighter crown awaiting him in a blissfull immortality.

The career of Judge DENIO at the bar and on the bench, has been marked and full of interest. In a county distinguished for the ability of its bar, he rose to eminence among such men as STORRS, BRONSON, and BEARDSLEY. Living in a community where true merit was appreciated, the modesty of his demeanor and his unassuming manners were aids, rather than obstacles in the way of his advancement.

In 1834 he was appointed circuit judge and vice-chancellor of the fifth judicial district, and then began the judicial career in which he became so distinguished. But his health failing

after about four years of service, he was compelled to resign and returned to the practice of his profession. He held, also, for a time the office of bank commissioner and other places of public trust better adapted to the state of his health, in all of which the duties were discharged with scrupulous fidelity. The five volumes of his reports of decisions made by the Court for the Correction of Errors, and the Supreme Court are models of accuracy and brevity of statement. No reporter has been more successful in extracting from the cases and opinions, and presenting in the syllabus, in concise and clear language, the real questions decided by the court.

But, Judge DENIO was destined to a higher and still more distinguished career. In June, 1853, he was appointed by the governor to fill a vacancy upon the bench of the Court of Appeals, and was twice re-elected to that position.

It was during his thirteen years of service in that court that Judge DENIO earned his very great reputation as a judge, a reputation acknowledged in Westminster Hall as well as in all the courts in the Union; a reputation that will prove as enduring as the annals of our jurisprudence. Having had the opportunity of viewing him from different stand-points, as well while, for a single year, associated with him in that court, as at a later period practicing before him at the bar, I may be permitted to speak more particularly of his qualifications. And I think those I address, who have shared with me these advantages of observations, will agree in all that I shall say of him.

His mind was peculiarly adapted to the discharge of the duties of the judicial office. It was clear, comprehensive, and discriminating, and singularly free from prejudice or bias. He had trained it to close attention, and to the mastery of details. In seeking out and selecting for consideration the true questions involved, he looked at the whole case with conscientious and characteristic fidelity. Though tenacious of his opinions, when deliberately formed, he never failed to treat, with respect, the opinions of those who differed from him. He felt deeply the great responsibility of making a decision from which there could be no appeal.

His diligence is best shown by allusion to the fact, which those who have been with him in consultation after a vacation will well recollect, that while he never failed to present written opinions in the cases assigned to him, he had also notes, with reference to all the other cases argued, which he had made on examination after the argument, to aid him when the final vote should be taken.

As a lawyer, Judge Denio ranked among the most learned our State has produced. By the aid of a good memory, impelled as well by a love of legal science as by considerations of duty, he became a most thorough and accomplished jurist. It is no disparagement to those who have been, from time to time, associated with him upon the bench, to say that I have often heard it said by counsel (and I shared fully in the sentiment they expressed) that they would willingly argue their case before him alone, sitting as a court of last resort. I speak, I am sure, the opinion of the bar, when I say that no judge ever sat on the bench in this State or elsewhere in whose learning, ability, and purity the public or the profession felt more confidence. History, which rarely fails to do justice to those who have passed away, will inscribe his name on the same page with Kent and Spencer, and Bronson. Like them he will be justly spoken of by those who follow him, as a great lawyer and a great judge.

There was an incident in his judicial life which ought not to pass unnoticed. During his first term of office in the Court of Appeals, a constitutional question came before that court for decision, in which, the judgment that he gave was in conflict with the public sentiment, and was generally considered by the members of the political organization which had nominated him as a departure from those strict rules of construction in which he had been educated.

It was near the close of his term, and popular clamor loudly demanded that he should not be re-nominated. It was an occasion to test the wisdom of our elective system. When the nominating convention assembled, an eminent citizen of our State feeling the imminent danger, that great injustice would be done to an able and upright judge, presented him-

self before that body, and in truthful and eloquent words discussed the question before it, and the considerations that ought to influence its action.

He pointed to the independence of the act complained of, the unquestionable purity of motive, the learning and known integrity of the man, the wicked injustice of condemning a judge for acting conscientiously and boldly, and the impolicy of such a condemnation with reference to future action of the judiciary. The appeal was successful, and he carried with him the convention, in opposition to its own preconceived intentions. Judge DENIO was unanimously re-nominated, and triumphantly elected. The result has done more to strengthen confidence in the wisdom of our elective judicial system, than any other event which has occurred since its adoption.

At the close of Judge DENIO's second term in 1856, to the universal regret of the profession he declined a re-election, though urged to continue on the bench by the leading men of both the great political parties of the State. Perhaps he was wise in retiring while in the full exercise of his intellectual powers. He felt that he had attained nearly to the allotted age of man, and he may have foreseen, not far distant, the impending blow which, as events proved, was soon to prostrate him, and afterward to sever the ties which bound him to earth. Who can say that "coming events" do not, as to each of us, "often cast their shadows before?"

Thus far I have alluded to the qualities of Judge DENIO, which characterized him as a judge. But I ought not to omit to speak of him as a man, for it is in the latter capacity that he holds the most intimate relations with the world, and by which his true personal character, for time and for eternity, is to be judged. And here, I am sure, he was a model worthy of imitation.

Without raising the veil to look at the endearing relations of that inner circle of domestic life to which he was bound so closely, who, of all his friends (and he had no enemies), did not love him for the child-like simplicity of his nature, the unselfish spirit which actuated him, the courtesy of his

manner, and the truthfulness and sincerity which governed every action of his life? The purity of his personal example, his faithful observance of the laws of God and man, and the unostentatious earnestness of his faith, secured for him the esteem and respect of all around him.

By them his memory will be cherished while memory lasts.

So much I have deemed due to the character and virtues of our deceased friend and associate.

He has left us, but we ought not to mourn his departure. His life has been a blessing to mankind. He has accomplished an enviable destiny. He has but anticipated, by a little time, the inevitable hour that awaits us all.

"*Nascentes morimur, finisque ab origine pendet.*"

And happy will be he, who like our departed friend, closing his eyes on the things of this world, can re-open them with Christian faith upon the clear blue sky of eternity.

At the conclusion of Judge Parker's address, the Hon. John H. Reynolds rose and presented to the court the proceedings had at a meeting of the bar, which were as follows:

"At a meeting of the bar of the State, held at the State Library on the 21st November, 1871, Henry R. Mygatt, of Oxford, was called to the chair, and William F. Cogswell of Rochester, and William P. Prentice, of New York, were appointed secretaries.

"A committee on resolutions, consisting of John H. Reynolds, of Albany, Francis Kernan, of Utica, and William A. Beach, of New York, reported the following resolutions, which were unanimously adopted:

"*Resolved*, That the members of the bar of the State of New York received the intelligence of the death of Hiram Denio with feelings of profound sadness and sorrow. By his long and honorable service at the bar and upon the bench, distinguished by uniform courtesy and kindness of demeanor, as well as by eminent ability and profound learning, he endeared himself to all his professional brethren; and now, at the close of his earthly career, they find a melancholy pleasure in giving to his memory this public expression of their respect and regard.

"*Resolved*, That, in the death of Judge DENIO, the State has been bereaved of a citizen whose daily life illustrated all the virtues of a Christian character, and of a man who never sought to evade any public or private duty. Of mild and unassuming manners, he was firm and unfaltering in noble purposes. In his profession, he was among the purest and ablest of his associates. And, upon the bench, his sterling integrity gave additional dignity to the court, while his pre-eminent talents and unrivaled learning shed new luster upon the already brilliant pages of our law.

"We may be glad that he lived so long, and feel regret that his career is ended; but we point with pride at the record of a life well spent in the labors of a profession to which he has left the priceless legacy of a spotless name, and the example of all that may be achieved by patient industry and persistent labor.

"*Resolved*, That the chairman of this meeting transmit a copy of these resolutions to the family of the deceased, and that he also present the record of these proceedings to the Court of Appeals, now in session, with a request that they be entered upon the minutes of the court."

The Hon. William J. Bacon then addressed the court, and presented resolutions passed at a meeting of the members of the bar of the county of Oneida.

Chief Justice CHURCH then said:

On behalf of the court, I desire to say, that we fully sympathize with and approve of all the sentiments contained in the resolutions and addresses which have been presented upon this occasion, and to express the heartfelt sorrow at the loss of one who, for so long a period, adorned the bench of this State.

For eminent ability, profound legal learning, and incorruptible integrity, Judge DENIO is justly entitled to a position in the very front rank of the distinguished jurists which this State and country have produced.

Some of the members of the court have been associated with him upon the bench; and they bear testimony to his uniform kindness and courtesy to his associates, and to the

untiring industry and great ability with which he discharged his judicial duties.

In his private life, as well as in his professional and judicial career, he has left a brilliant example, which all of us may well imitate and follow.

In all the relations of life he sustained, in the highest sense, the character of an upright citizen, able judge, and Christian gentleman. And, although he has passed from the cares and turmoil of this world, and we shall see his face no more, his memory will be cherished, and his influence felt, we have reason to believe, while enlightened jurisprudence shall be recognized among the institutions of mankind.

The resolutions presented will be entered at large upon the minutes of this court, and, as a further mark of respect, the court will now adjourn.

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1. In an action brought after a debtor's discharge in bankruptcy, to enforce a lien upon property held by the debtor's wife, claimed to have existed at the time of the discharge, under the provisions of sections 51 and 52 of the statute of uses and trusts (1 R. S., Edmonds' ed., 677, §§ 51 and 52).—*Held*, that those sections do not give a specific lien upon the property, but an equitable right to be enforced by suit in equity, after all *available* legal remedies are exhausted; that the commencement of the equitable action and filing of *lis pendens* is necessary to constitute a lien, and that as in this case, before the commencement of such action, the judgment or debt, which is the foundation thereof, was extinguished, the relation of debtor and creditor did not exist, and the action would not lie. *The Ocean National Bank* v. *Olcott*. 12

2. "The Florence Mills," having a balance of $694.83 to its credit with defendant, sent to it, on the 2d April, by mail, a check on another New York bank for $4,895, accompanied by a letter containing this direction: "which (the check inclosed) please credit our account, and charge us our note of $5,000, due the 4th instant." The check was received and credited in account on the 3d, and, on the same day, defendant paid a past due note of $5,000, of "The Florence Mills," payable at defendant's bank, and charged it in account. On the 4th, the note referred to in the letter, held by plaintiff, was presented and payment refused.—*Held*, that the direction contained in the letter did not transfer the fund; that plaintiff acquired no title to it, and could not recover. *The Ætna National Bank* v. *The Fourth National Bank of New York*. 82

3. To maintain an action for the partition of lands, the plaintiff must, at the time of its commencement, have actual or constructive possession in common with defendants. A subsisting adverse possession is an absolute bar. *Florence* v. *Hopkins*. 182

4. When the bank account of a firm is kept in the name of one of its members, and all checks are drawn in his name, with the knowledge and assent of the others, the firm

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1. A bailee for hire, who uses the property contrary to the instructions of the bailor, is liable for a conversion thereof. Where property in the exclusive possession of such bailee, is injured in a way that ordinarily does not occur, without negligence, the burden of proof is upon the bailee, to show that the injury was not occasioned by his negligence. *Collins* v. *Bennett.* 490

CORPORATIONS.

1. Under the act to provide for the incorporation of religious societies (chap. 60, Laws of 1813, 3 Edmonds, Stat. 687), the trustees of such a corporation are authorized to act in its behalf, in taking the steps required by section 11, for the purpose of effecting a sale of its real estate, and their acts are binding upon it, although it does not appear they had the express sanction or authority of a majority of the corporation. *M. A. Baptist Church* v. *Baptist Ch. in O. St.* 131

2. Religious corporations have no common-law rights to alienate their real estate, and to constitute a sale within the meaning of section 11; there must be a valuable consideration inuring to the corporation as such. Therefore, an order of the Supreme Court, authorizing a conveyance founded upon a petition, showing the only consideration for the contemplated transfer, to be a benefit to the individual corporators, is without jurisdiction, and a deed executed in pursuance thereof is void. *Id.*

3. A corporation cannot be formed under the act for the incorporation of benevolent, charitable, scientific, and missionary societies (chapter 319, Laws of 1848), except for some or one of the purposes therein named. The right to file a certificate in the office of the Secretary of State, by which a body politic and corporate is to be *ipso facto* created, only exists in behalf of those who bring themselves within the terms of the act. *The People ex rel.* v. *Nelson.* 477

4. A corporation for business purposes, having in view pecuniary gain and profit to the corporators, does not come under this act, although it may contemplate the promotion of the temporal interests of others. *Id.*

5. The consent and approbation of a justice of the Supreme Court required by the act, is but one of the conditions precedent to the right to file the certificate, and is neither conclusive upon the public nor upon the Secretary of State, who is not required to file a certificate unauthorized by the act. *Id.*

6. The provisions of section 2 of act of 1853 (chapter 333 of the Laws of 1853), amending the act of 1848 (chapter 40 of the Laws of 1848), authorizing the formation of corporations for manufacturing and other purposes, does not authorize the issue of stock, in addition to the capital stock stated in the certificate of organization, and any increase thereof made pursuant to the act of 1848. It simply authorizes the payment for such stock, in property necessary for the business of the company instead of in cash; and under its provisions the whole capital stock can be paid for in property, and when so paid for, the owner thereof is not liable to the creditors of the company under section 10 of the act of 1848. *Schenck* v. *Andrews.* 589

* This paragraph was inadvertantly omitted in the syllabus to case.

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4. The omission of an account of real and personal estate, as it existed at the time of the debtor's arrest, as required by section 4, is not supplied by allegations in the petition, that prior to the rendition of the judgment, in execution of which the debtor was arrested, he filed his petition in bankruptcy, was adjudged a bankrupt, and an assignee of all his property was appointed. *Id.*

INSURANCE—FIRE.

1. Plaintiff being the owner of a woolen factory and machinery therein, contracted to sell the same to C., the deed to be executed when the whole purchase-price was paid, C., to pay for insurance. Plaintiff insured with defendant, C., paying the premium. The policy contained conditions precedent, in case the same was held as collateral security, and also restrictions upon the use of inflammable liquids used as a light. Kerosene oil was used for lighting purposes.—*Held*, 1st. Plaintiff had an insurable interest in the property itself. 2d. The policy was in fact taken for C.'s benefit upon the property, and not upon the debt against him, and was not held as collateral security within the meaning of the condition. 3d. That inasmuch as the legislature has declared certain grades and qualities of kerosene proper and safe to use, the right to take judicial notice could not be invoked, to establish its inflammable (i. e., explosive) qualities; but it was incumbent upon defendant to show, that the kerosene used was in fact "inflammable." *Wood* v. *The Northwestern Insurance Company.* 421

2. Defendant issued a policy of insurance to L. J. S. upon his dwelling-house. The policy contained a clause, that if the property was sold or transferred, or any change took place in title or possession, without the consent of the company, it would be void. The property was transferred to plaintiff March 4th. The policy was renewed March 21st and was transferred to plaintiff April 15th, on the same day defendant's agent consented to the transfer of the policy. L. J. S. remained in possession. During a temporary absence he left the house in charge of B, and it was destroyed by fire. —*Held*, that the renewal revived the original policy, and continued it with all the virtue which it would have had for any purpose, if it had not expired. That the consent to the assignment was equivalent to an agreement, to be liable to the assignee upon the policy as a subsisting operative contract, for which agreement the retention of the premium received on the renewal was a good consideration. That there was no change of possession within the meaning of the contract, and that the company was liable. *Shearman* v. *The Union Fire Insurance Company.* 526

3. Under the provisions of the act of 1853, to provide for the incorporation of fire insurance companies (chap. 466, Laws of 1853), a personal demand of the maker of a premium note, given to a mutual fire insurance company, is only made necessary, where it is sought to recover a judgment for the entire note, as a penalty for neglecting to pay a partial assessment thereon. Assessments upon notes given prior to the passage of the act were unaffected by it, and could be recovered without such demand. Where, therefore, a premium note given prior to 1853 was regularly assessed to its full amount, the time of payment fixed, and notice of the assessment duly published, as required by the charter and by the laws of said company, the whole note became due and payable upon the day fixed for its payment, and after the lapse of six years therefrom, an action upon it is barred by the statute of limitations. *Sands* v. *Lilienthal.* 541

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* This paragraph was inadvertantly omitted in the syllabus to case.